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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF WISCONSIN,

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

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OFFICIAL REPORTER.

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JUDGES OF THE SUPREME COURT

OF THE

STATE OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

ORSAMUS COLE,	CHIEF JUSTICE.
WILLIAM P. LYON,	ASSOCIATE JUSTICES.
DAVID TAYLOR,	
HARLOW S. ORTON,	
JOHN B. CASSODAY,	

Attorney General, - - L. F. FRISBY.

Clerk, - - - CLARENCE KELLOGG.

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MEMORANDUM.

The headnotes to the case of *Wisconsin Central Railroad Company v. Price County and others*, reported on page 579, were prepared by Mr. Justice CASSODAY.

ERRORS NOTED IN THIS AND PREVIOUS VOLUMES.

VOL. 63.

Page 669, line 14. For 22 Wis. 339, read 22 Wis. 353–4.

Page 710. Omit from table: Section 1852, subd. 2....182.

VOL. 64.

Page 173, lines 3–6. Read: "was held to be a sufficient averment of their correct translation in *Simonsen v. Herold Co.* 61 Wis. 626, citing Odgers' precedent No. 30. It will be observed," etc.

Page 197, line 22. For 40 Wis. 497, read 48 Wis. 497.

Page 300, line 5 from bottom. For *Shæffner*, read *Schæffner*.

Page 368, line 11 from bottom. For 13 Wis. 737, read 13 Wis. 653.

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CASES DETERMINED

AT THE

August Term, 1885.

WILLIAMS, Appellant, vs. **THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY**, Respondent.

September 4 — September 22, 1885.

Railroads: Signals at highway crossing: Contributory negligence.

1. **Though the whistle is not blown nor the bell rung on a locomotive before crossing a highway, as required by statute, the railroad company is not liable for an injury resulting from a collision at such crossing if the negligence of the person injured contributed thereto.**
2. **The evidence in this case (stated in the opinion) is *held* to show conclusively that if the driver of the plaintiff's team had exercised ordinary vigilance while approaching a railroad crossing he would have discovered the locomotive by which such team was struck, in time to have avoided the collision.**

APPEAL from the Circuit Court for *Columbia* County.

Action to recover damages for injuries to the team and wagon of the plaintiff, caused by an engine and caboose of the defendant running into them as they were crossing the railroad track upon a highway near the city of Columbus. The facts are stated in the opinion. At the close of the plaintiff's testimony the circuit court granted a nonsuit, and from the judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *J. C. McKenney* and *J. J. Sutton*, and oral argument by *J. W. Wagner* and *Mr. Sutton*. To the point that when the company neglects

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to give the customary signals, want of ordinary care cannot be imputed to a person because he fails to look up and down just before crossing the track, they cited *Ernst v. H. R. R. Co.* 39 N. Y. 61, and 35 id. 9; *Beisiegel v. N. Y. C. R. Co.* 34 id. 622; *Mackay v. N. Y. C. R. Co.* 35 id. 75; *Continental Imp. Co. v. Stead*, 95 U. S. 161.

For the respondent the cause was submitted on the brief of *John W. Cary*, attorney, and *Burton Hanson*, of counsel. To the point that it was the duty of the driver to have looked in the direction of the approaching train, when, by so doing, he could have seen it in time to have avoided it, and that, failing to look, he was guilty of negligence, they cited *Rothe v. M. & St. P. R. Co.* 21 Wis. 256; *Langhoff v. M. & P. du C. R. Co.* 23 id. 43; *Delaney v. M. & St. P. R. Co.* 33 id. 67; *Haas v. C. & N. W. R. Co.* 41 id. 44; *Kearney v. C., M. & St. P. R. Co.* 47 id. 145; *Steves v. O. & S. R. Co.* 18 N. Y. 422; *Ernst v. H. R. R. Co.* 39 id. 61; *Havens v. Erie R. Co.* 41 id. 296; *Harty v. Cent. R. Co.* 42 id. 468; *Gorton v. Erie R. Co.* 45 id. 660; *Mitchell v. N. Y. C. & H. R. R. Co.* 64 id. 655; *Salter v. U. & B. R. Co.* 75 id. 273; *Cordell v. N. Y. C. & H. R. R. Co.* id. 330; *Connelly v. N. Y. C. & H. R. R. Co.* 88 id. 346; *Tolman v. S. B. & N. Y. Co.* 98 id. 198; *Butterfield v. Western R. Corp.* 10 Allen, 532; *Allyn v. B. & A. R. Co.* 105 Mass. 77; *Hinckley v. Cape Cod R. Co.* 120 id. 257; *Wright v. B. & M. R. Co.* 129 id. 440; *C. & R. I. R. Co. v. Still*, 19 Ill. 499; *Ill. Cent. R. Co. v. Buckner*, 28 id. 299; *T., P. & W. R. Co. v. Riley*, 47 id. 514; *St. L., A. & T. H. R. Co. v. Manly*, 58 id. 300; *C. & A. R. Co. v. Jacobs*, 63 id. 178; *C., R. I. & P. R. Co. v. Bell*, 70 id. 102; *C., B. & Q. R. Co. v. Demerell*, 81 id. 450; *Benton v. R. Co. of Iowa*, 42 Iowa, 192; *Schaefert v. C. & N. W. R. Co.* 62 id. 624; *Donaldson v. M. & St. P. R. Co.* 21 Minn. 293; *Brown v. M. & St. P. R. Co.* 22 id. 165; *Abbett v. C., M. & St. P. R. Co.* 30 id. 482; *N. Penn. R. Co. v. Heileman*, 49 Pa. St. 60; *Hanover R. Co. v. Coyle*, 55

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id. 396; *P., Ft. W. & C. R. Co. v. Dunn*, 56 id. 280; *Penn. R. Co. v. Beale*, 73 id. 504; *Scofield v. C., M. & St. P. R. Co.* 8 Fed. Rep. 488; 114 U. S. 615; *Continental Imp. Co. v. Stead*, 95 U. S. 164; *Railway Co. v. Houston*, id. 697.

CASSODAY, J. The following facts are conclusively established by the evidence: At the place of the injury the railway ran east and west, and the public highway ran across it north and south. The plaintiff's team, driven by his hired man, approached the crossing from the north. The engine, with a caboose attached, approached the crossing from the west. Two men rode with the driver, sitting on dump-boards lying flat on the bolsters of the wagon, with their feet hanging down, and their faces towards the east and their backs towards the west. When they got opposite a house on the west side of the highway, at a point about twenty-five rods north of the crossing, one of the men got off, and after walking about five rods west towards the house saw the engine and caboose coming from the west and about forty-five rods distant from the crossing. Between the point where the man got off and a point about eighteen rods north of the crossing there were a few trees on the west side of the highway; but from that point to the crossing, a distance of about eighteen rods, there was no house nor tree, nor anything to obstruct the view, except the deep cut through which the track ran. This cut was about ten feet deep in the deepest place, and from that point sloped each way, so that at a distance of about sixty feet each way therefrom it was only about six or seven feet deep. The cut wholly disappeared several rods west of the crossing, so that a person in the highway 100 feet north of the crossing could see the track for 100 feet west of the crossing, and could see a train or smoke-stack of a train several rods further west. After the man got off at the point twenty-five rods north of the crossing, the team, with

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the driver and the other man sitting on the dump-boards with their faces towards the east, talking, moved on south towards the crossing; and when they reached the last tree, about eighteen rods north of the crossing, the driver looked over his right shoulder to the west, but saw no train. The horses walked from that point to the crossing, but neither the driver nor the man with him looked again to the westward until the engine was close on the cattle-guard and the horses nearly on the railroad track. While passing over these eighteen rods there was a considerable portion of the distance that a coming train from the west could have been seen, if within thirty rods of the crossing, and for the entire distance, except perhaps at the deepest point of the cut, the top of the smoke-stack could have been seen, if anywhere within thirty rods of the crossing. The horses were a quiet team, and would have stopped at any time before reaching the track had the driver said "whoa." The engine was run unusually fast, without blowing the whistle, ringing the bill, or giving any other signal, until it reached the cattle-guards.

The failure to blow the whistle and ring the bell before crossing the highway was such statutory negligence as would, in the absence of contributory negligence on the part of the driver, make the defendant liable in this action. Sec. 1809, R. S.; *Bower v. C., M. & St. P. R. Co.* 61 Wis. 457; *Ransom v. C., St. P., M. & O. R. Co.* 62 Wis. 178; *Hoye v. C. & N. W. R. Co.* 62 Wis. 668. In *Bower v. C., M. & St. P. R. Co., supra*, it was, in effect, held that if the driver could have prevented the accident by using his eyes in looking, and his ears in hearing, then there could be no recovery. But the fact is conclusively established by the evidence that had the driver, while approaching the crossing, exercised ordinary vigilance in looking in the direction of the coming engine, he would have discovered it in time to have stopped the team before reaching the railroad track, and thus pre-

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vented the injury. Failing so to do, he was clearly guilty of contributory negligence, under all the authorities. In support of this, the respondent's counsel have cited so many cases that we do not feel called upon to cite any.

By the Court.—The judgment of the circuit court is affirmed.

SOWARDS, Respondent, vs. STEPHENS, Appellant.

September 4—September 22, 1885.

Appealable order.

An order, made upon a motion to dismiss an appeal from a justice's court, directing that the cause stand upon the calendar until the next term; that the plaintiff have leave in the meantime to tax the costs according to a stipulation of the parties; and that if the defendant pay such costs and otherwise comply with the stipulation the action be dismissed, but that if he fail to do so the plaintiff have leave at the next term to renew his motion to dismiss the appeal,—is not appealable.

APPEAL from the Circuit Court for *Columbia* County.

The action was commenced in justice's court and a judgment by default was rendered against the defendant, July 17, 1883, from which he appealed to the circuit court. On November 26, 1883, the parties stipulated that the action should be discontinued upon payment by the defendant of the sum of ten dollars damages and the costs of the action. At the December term, 1884, of the circuit court, the order was made from which this appeal is taken. Other facts are stated in the opinion. The respondent moves to dismiss the appeal.

J. J. Sutton, for the respondent.

G. W. Stephens, appellant, *in pro. per.*

COLE, C. J. The appeal in this case was noticed for trial in the circuit court by the plaintiff. Not being tried at the

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third term after the appeal was taken, a motion was made on behalf of the plaintiff, based on the affidavit of her attorney and a stipulation on file, to dismiss the appeal, with costs. In opposition to this motion the defendant read his affidavit, and the affidavits of the plaintiff and her husband, to show that the action had been settled. No motion was made, however, to dismiss the action. The circuit court, after hearing the defendant's counsel, ordered that the case stand upon the calendar until the next term; that in the mean time the plaintiff's attorney have leave to tax the costs according to the stipulation on file; and that upon the payment of the costs so taxed, and the amount stipulated to be paid to the plaintiff's attorney, within thirty days after the costs were taxed and notice given to the defendant, the action be dismissed; otherwise the plaintiff's attorney, at the next term of the court, have leave to move for the dismissal of the appeal.

This is the substance of the order brought here for review. The question is, Is such an order appealable? It appears to us it is not. The order does not settle definitely any right, nor does it either determine the action or dispose of the appeal. It merely provides that the cause stand upon the calendar until the next term; that the plaintiff have leave, in the meantime, to tax the costs; then, if the defendant pay such costs and comply with the stipulation, the action shall be dismissed. But if the defendant neglected or refused on his part to comply with the order, the plaintiff's attorney has leave to move at the next term for the dismissal of the appeal. But the cause is kept upon the calendar for the further action of the court. The order is essentially one continuing the cause, and giving the plaintiff, in a certain contingency, leave to renew his motion to dismiss the appeal. An order which does not make a final disposition of the cause, but merely operates to continue it for the term, has often been held not appealable. *Roby v.*

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Hudd, 22 Wis. 639; *In re Will of Kneeland*, 40 Wis. 344; *Bassett v. Jenkins*, 41 Wis. 197, and cases cited in the opinions. Such, it seems to us, is really the character of this order.

The appeal must be dismissed, with costs.

By the Court.—Appeal dismissed.

BANK OF NEW LONDON, Respondent, vs. KETCHUM and another, Appellants.

September 5—September 22, 1885.

CONTRACTS: BANKING CORPORATIONS. *(1) Agreement to pay debt of another: Evidence. (2) Ratification of informal act of directors.*

1. The evidence in this case is *held* to warrant a finding that the plaintiff bank, upon taking the assets and assuming the liabilities of the private banking business of one P., did not agree to pay certain notes executed by him, and that the plaintiff was therefore not liable to the defendant upon a counterclaim for moneys paid by the latter as indorser on said notes.
2. Where a majority of the directors of a bank make an informal agreement to take the assets and assume the liabilities of a private banking business, and the corporation thereupon takes and retains such assets under the agreement, it will be held to have ratified the action of the directors and to be bound by all the terms of the agreement.

APPEAL from the Circuit Court for *Outagamie* County.

The action is upon a promissory note, dated February 2, 1883, made by the defendant *Ketchum*, indorsed by the defendant *Hoxie*, and held and owned by the plaintiff bank. The liability of the defendants to the bank on this note is not denied.

The defendants, in their answer, set up a counterclaim for moneys paid at various times by *Ketchum* (who is the principal debtor on the note in suit) to one C. P. Skinner,

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and allege that such payments, which exceed the amount of the plaintiff's demand, were made for the plaintiff on demands which the latter had assumed and agreed to pay. Whether such payments were or were not so made for the bank, was the only question litigated on the trial. The jury found they were not, and returned a verdict for the plaintiff for the full amount of the note in suit. The court denied a motion for a new trial, and gave judgment for the plaintiff pursuant to the verdict. The defendants appeal from the judgment. The case is stated in the opinion.

For the appellants there were briefs by *G. W. Cate*, attorney, and *E. P. Smith*, of counsel, and oral argument by *Mr. Smith*.

Gabe Bouck, for the respondent.

LYON, J. The jury found, in effect, that the moneys mentioned in the counterclaim, which were paid by *Ketchum* to Skinner, were not so paid for the plaintiff bank, and hence such payments were no grounds for a counterclaim against it. This is the necessary significance of the verdict. The only question upon the evidence is, therefore, Does the testimony sustain the verdict in this behalf?

In the summer and fall of 1876 a private banking business was carried on at New London, ostensibly by L. C. Patterson & Co., under the style of "The Bank of New London." The testimony tends to prove that L. C. Patterson alone carried on the business; also that he carried on other business, or "transactions," as a witness calls them, entirely separate from his banking business. About September 1, 1876, Patterson and some twenty other persons duly recorded a certificate for the incorporation, under state laws, of the "*Bank of New London*," the plaintiff, in which Patterson is named as president, and one Bingham as vice-president. Also nine directors were named, among whom were the defendant *Ketchum*, and Messrs. Bingham, Dixon,

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Sterling, and Logan, hereinafter mentioned. Down to November 25, 1876, the board of directors did nothing except to adopt by-laws, and the corporation transacted no business, and had no assets whatever.

November 13, 1876, Patterson executed six notes of $1,000 each to the order of J. W. Bingham, payable at a bank in Chicago, and Bingham, Logan, Dixon, and Sterling, above named, and the defendant *Ketchum* indorsed them to C. P. Skinner, cashier, or order, for the accommodation of Patterson. The First National Bank of Westfield, New York, of which Skinner was cashier, received these notes, and before November 25th advanced to Patterson $3,500 thereon. [For convenience we will hereinafter refer to these notes as held by Skinner.]

On the evening of Saturday, November 25, 1876, Skinner, and the five indorsers above named, met in the banking-house of Patterson & Co. (or Patterson) and discussed the affairs of Patterson, who was insolvent. At that interview schedules of the assets of the private bank of Patterson, consisting entirely of its bills receivable, or discounts, and a small sum of money, and of its liabilities, consisting entirely of sums due depositors, were furnished by Mr. Perrin, the clerk in such private bank. In these schedules the liabilities exceeded the assets $4,445. Skinner informed the other persons present that he had advanced $3,500 to Patterson on the notes of November 13th, indorsed by them. He also insisted that certain notes of Patterson to Brown & Briggs for $2,200 should be paid out of the proceeds of the notes for $6,000, for the reason that Patterson was criminally liable upon such indebtedness. He proposed that the plaintiff bank purchase the assets of the old banking-house, pay its liabilities, and commence and continue its business, and offered to loan the plaintiff a certain sum of money to enable it to do so. This proposition seems to have been accepted and agreed to by the five indorsers, who,

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although constituting a majority of the directors of the plaintiff, manifestly were not acting as a board of directors.

On Monday morning, November 27, 1876, the board of directors of the plaintiff held a special meeting and resolved to open the bank that morning for the regular dispatch of business. The board did not formally ratify and confirm the agreement of the five directors and indorsers of the preceding Saturday evening, but the plaintiff, by its authorized officers and agents, took the scheduled assets of the private bank, and at once commenced the business of banking. It also paid the scheduled depositors, and accepted a loan of money from Skinner. On the same day (November 27th) Patterson executed to Bingham, in trust for the five indorsers, a bill of sale of certain personal property, including the furniture, stationery, etc., in the banking-house, and an obligation to convey to him, in trust for the same persons, certain lands owned by Patterson. These instruments contain no other declaration of trust, although the testimony tends to show that the real trusts agreed upon were that the trustee should dispose of the trust property and apply the proceeds (1) to pay the plaintiff all sums it might have to pay for Patterson in excess of the assets received, and (2) to pay any surplus to the indorsers, to indemnify them for what they should pay by reason of their indorsements.

At the same time the six $1,000 notes were canceled, and other notes given by the five indorsers in place of them. The latter notes were renewed from time to time, and were ultimately paid by such indorsers in equal proportions. Some of these notes were made payable to Bingham; others, to Bingham, president. The defendant *Ketchum* paid one fifth of the $6,000, besides interest.

On November 28th, the day after the plaintiff commenced business, Patterson resigned the presidency of the plaintiff, and Bingham was duly appointed in his place. A vice-pres-

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ident and cashier were also appointed. The plaintiff has continued its business until the present time.

The single question of fact is, Did the plaintiff assume and agree to pay the indebtedness of Patterson to the defendant *Ketchum*, resulting from his having indorsed the notes of Patterson and afterwards paying a portion of the indebtedness created thereby? It is obvious, from the foregoing statement of the case, that there is nothing in the case which fixes any liability upon the plaintiff to reimburse the defendant *Ketchum* for such payments, unless the plaintiff so agreed. The fact that the plaintiff became the owner of the assets of Patterson's banking-house, or of all the assets of Patterson, does not charge it with the payment of this debt of Patterson to the said defendant, or any other debt of his, unless the plaintiff, as part of the consideration of the purchase, agreed to pay the same. Whether it did so agree is the question to which the testimony on the trial was largely directed, and such testimony is conflicting. There was ample testimony on the part of the defendants tending to show that the plaintiff did so agree, to have upheld the verdict, had it been for the defendants, sustaining the counterclaim. On the other hand, we are clearly of the opinion that there was also sufficient testimony to warrant the jury in finding that the plaintiff did not assume the payment of Patterson's notes, upon which the defendant *Ketchum* was an indorser. Conceding that the plaintiff ratified the terms of the alleged agreement made on the evening of November 25th, pursuant to which the assets of Patterson passed to the plaintiff, and that it is bound thereby (and we think the plaintiff has ratified it and is so bound), there was positive testimony that the agreement was that the plaintiff should assume no indebtedness of Patterson other than what he owed to depositors in his private bank, and that the indebtedness on which the counterclaim is predicated had no connection with Patterson's banking busi-

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ness, and was not included in such agreement, and hence not assumed by the plaintiff. With such testimony in the record the verdict cannot be set aside as against evidence.

The instructions given to the jury by the court were to the effect that if the plaintiff's board of directors assumed this debt on November 25th, or afterwards ratified the informal agreement of members of such board to do so, the defendants' counterclaim was thereby established. Also that a failure to return the assets of Patterson, which it received under the agreement, would be such ratification by the bank, and would bind it to pay the agreed price therefor, including the notes of November 13th, if the agreement was that the plaintiff should pay them. This, we think, is the law of this case. Besides, our attention has not been directed to any exception to the charge of the learned circuit judge, and it is unnecessary to state it more fully, or to comment further upon it.

Errors are assigned upon several rulings of the court sustaining objections to testimony offered on behalf of the defendants, or rather to questions put to witnesses. We have examined these objections, and are satisfied that such of the interrogatories as were admissible and material and in proper form, were fully answered in the course of the trial, and that the rulings of the court did not operate to shut out any material testimony which ought to have been received.

Error is also assigned on the refusal of the court to grant a new trial. There was an utter failure by the defendants to make any showing which would entitle them to a new trial, and their counsel seem not to rely upon this assignment of error.

The judgment of the circuit court must be affirmed.

By the Court.— Judgment affirmed.

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DASKAM, Respondent, vs. BEEMER, Appellant.

September 5 — September 22, 1885.

APPEAL TO S. C. *(1) Question of fact: Bill of exceptions.*
BOUNDARIES. *(2) Location of quarter-section corner: Evidence.*

1. A finding of fact upon a question depending upon the weight of evidence will not be disturbed where the bill of exceptions does not appear to contain all the evidence.
2. A party who claims that a quarter-section corner is not a lost corner, but was originally located at a certain place at some distance from where it ought to be, must not only produce evidence tending to show that it was so located, but must establish that fact by a preponderance of the evidence; and if the distance from the proper place is great the evidence should be very clear.

APPEAL from the Circuit Court for *Langlade* County.

The case is stated in the opinion.

For the appellant the cause was submitted on the brief of *Jno. E. Martin.*

For the respondent there was a brief by *Thomas Lynch*, attorney, and *Gabe Bouck*, of counsel, and oral argument by *Mr. Bouck.*

TAYLOR, J. This is an action of ejectment, and the contest in the case depends upon the location of the quarter-section post in the north line of section 20, in township No. 31 N., of range 11 E. The plaintiff claims to own the N. W. ¼ of said section 20. The defendant claims to own the W. ½ of N. E. ¼ of same section. On the trial the plaintiff established his title to the N. W. ¼ of said section, and the defendant his title to the W. ½ of the N. E. ¼.

On the part of the plaintiff it was contended that the quarter post in the north line of section 20 could not be found, and therefore claimed to have the said quarter post established as a lost corner, and by so establishing it there is no doubt but that the plaintiff is entitled to recover the

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possession of the land claimed by him. On the part of the defendant it is claimed that the original quarter-section corner in the north line of said section was a known and well-identified corner, and therefore such original corner must be taken as the true corner, notwithstanding it is not at the place called for by the courses and distances in the record of the original survey; and that, treating the corner claimed to have been proved to be the original corner by the defendant, as the original corner established by such survey, the defendant owns the land in controversy, and the judgment should have been in his favor.

The action was tried by the court without a jury. The court found in favor of the plaintiff. Exceptions were taken to the findings of fact and conclusions of law by the defendant. The only question in the case is whether the findings of fact are supported by the evidence. The effect of the findings of the court was that the proofs failed to show that the original quarter-section corner was established by the original survey at the place claimed by the defendant; that such corner must be treated as a lost corner, and the division of the section be made by establishing a quarter corner in the manner prescribed by law. So established, the land in controversy would be a part of the N. W. ¼ of said section 20, and the plaintiff's land.

The question being one which depends upon the weight of evidence, and it not appearing that the bill of exceptions contains all the evidence given on the trial in the court below, this court is unable to determine the question whether the evidence given on the trial did or did not sustain the finding. As it is the appellant's duty to show affirmatively that the court erred in its findings, he must fail, because this court has not before it the means of intelligently determining the question presented to it.

The learned counsel for the appellant in his brief contends that "if there is any evidence tending to show that

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the government surveyors located the quarter post at the point where he claims it to have been located, on the north line of section 20, the post must remain as located, notwithstanding the fact that it is a considerable distance from the center of the line." If this is a proper statement of the rule of law, then the bill of exceptions, although imperfect, might be sufficient, as it is clear that it does contain some evidence tending to show that the quarter post was located by the original survey as claimed by the defendant.

The learned counsel has not stated the rule of law correctly. The question in the case is not whether there is evidence tending to show that the quarter post claimed by the defendant is the true one placed by the original survey, but whether the evidence establishes the fact that the quarter post claimed by the defendant is the one established by the original survey; and that fact we cannot determine without a consideration of all the evidence given on the trial. We can do nothing, therefore, but affirm the judgment. It might not be out of place, however, to suggest that when it is sought to establish the existence of an original quarter post at a point so far from the point where it ought to have been placed by the government surveyors, the evidence ought to be very clear and certain. The fact that the claimed original quarter post is nearly fifty rods west and fourteen rods south of the place where it ought to be, is in itself strong evidence tending to disprove the validity of the claim, and such a corner should not be established except upon very clear proofs.

By the Court.—The judgment of the circuit court is affirmed.

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THE CITY OF SEYMOUR, Appellant, vs. THE TOWN OF SEYMOUR, Respondent.

September 5 — September 22, 1885.

Towns: Cities: Division of property: Verdict: Evidence.

A verdict to the effect that certain railroad stock had been apportioned and divided between the parties, or that the city had received an equivalent of its share thereof, is *held* not to be supported by any evidence.

APPEAL from the Circuit Court for *Outagamie* County.

Action to recover a certain proportion of the value of railroad stock alleged to have been converted by the defendant town. The cause was before this court on a former appeal and is reported in 56 Wis. 314. Upon the second trial there was a verdict for the defendant, and from the judgment entered thereon the plaintiff appealed.

For the appellant the cause was submitted on the brief of *C. E. McIntosh* and *Sloan & Bottensek.*

Humphrey Pierce, for the respondent.

ORTON, J. The nature of this action and nearly, if not quite, all the facts appear in the case reported in 56 Wis. 314. The railroad stock belonged to the town, and was the property of the town to be divided at the time of the incorporation of the city, and the town afterwards sold and disposed of it, and appropriated its proceeds to its own use. The defense is that said stock was divided and apportioned by the town board at the meeting March 25, 1879, together with the general funds and indebtedness of said town, or that in the apportionment of the funds and property of the town this stock was considered and given to the town as a part of its share of the property.

The only record evidence of any apportionment made was at the above date, and that only shows that the indebtedness was apportioned and the moneys belonging to the

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town. It does not show that this railroad stock or any other property of the town was apportioned and passed over to the city, and the moneys were apportioned exactly according to the rule fixed by law, and it does not appear that the railroad stock was considered or taken into account in any manner whatever. There was evidence, by the testimony of the chairman of the town for that year, that it was understood at the time that the railroad stock should not then be divided, but should remain for the future action of the board.

This testimony was disputed by other witnesses then present, but there was no evidence, oral or by record, that the stock was ever apportioned or divided. At the time, the city owned and was entitled to have and receive its proper share of it. It was incumbent upon the town to show that the city received such share, and it does not appear by the evidence of record or otherwise that the city has ever received such share, or any part of it; but, on the other hand, the record negatively shows that it was not considered or divided by its silence and omission. The jury were distinctly instructed that, if they should find such a state of facts, they should find for the plaintiff; and yet, without a particle of evidence to that effect, they must have found that the stock had been apportioned and divided, or that the city had received an equivalent of its share in the apportionment, and found a verdict for the defendant.

The verdict was unsupported by any evidence and clearly against all the evidence in the case. The plaintiff city was entitled to a verdict for the value of its proper share of the railroad stock at the time of its conversion by the town.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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MEADE, Appellant, vs. GILFOYLE, Respondent.

September 5 — September 22, 1885.

TAX TITLES: CONSTITUTIONAL LAW. *(1) Description in tax deed: Retroactive statute. (2) Uncertainty: Extrinsic evidence. (3) Practical location.*

LIMITATION OF ACTIONS: ADVERSE POSSESSION. *(4) Pleading. (5, 6) Parol contract of sale: Receipt for purchase price: "Written instrument." (7) Notice.*

HUSBAND AND WIFE. *(8) Agency: Evidence.*

1. Ch. 53, Laws of 1866 (R. S. sec. 1047; ch. 268, Laws of 1881), providing that in tax deeds *theretofore*, as well as those thereafter, issued, "any description of lands which shall indicate the land intended with ordinary and reasonable certainty, and which would be sufficient between grantor and grantee in an ordinary conveyance, shall be sufficient,"— is valid.
2. Under that act extrinsic evidence is admissible in aid of the description in tax deeds whenever it would be admissible in the case of ordinary conveyances.
3. Where the language in the description of the land conveyed or excepted from the conveyance is otherwise doubtful, a practical location by the agreement, acts, conduct, or declarations of the parties concerned, followed by adverse and exclusive possession, is sufficient to remove the doubt and give certainty to the description.
4. If the facts showing that the time limited for bringing the action has expired are stated in the answer, the statute of limitations is available as a defense, although it is not stated that any particular statute is relied upon.
5. To establish adverse possession of land under claim of title founded upon a written instrument, the vendee in possession under a parol contract for the sale of the land may avail himself of the former possession and title deeds of his vendor.

[6. Whether a mere receipt for the purchase price of land is such a written instrument as would form the basis of a claim of adverse possession under sec. 4211, R. S., is not determined.]

7. Actual possession by the vendee in a land contract is notice to all the world of his rights.
8. A wife who, by her husband's direction, makes a demand for a deed and an offer of payment, is for that purpose his agent, and may testify in his behalf to such demand and offer.

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APPEAL from the Circuit Court for *Outagamie* County.

The case is thus stated by Mr. Justice CASSODAY:

"This is an action of ejectment, commenced August 9, 1883, for a part of a lot described in the village of Kaukauna. The complaint is in the usual form and alleged that the defendant had unlawfully withheld the possession since June 1, 1883. The answer was a general denial, and an equitable counterclaim, to the effect that in 1869 the defendant, by verbal contract, purchased the land of D. J. Brothers and paid for the same, and went into the actual and exclusive possession thereof, and cleared and fenced the same in that year, and had been in the open and exclusive possession and occupancy of said premises ever since that time as a residence and homestead for himself and family; that after the defendant so purchased and went into such possession, the plaintiff, through mesne conveyances and with notice of the defendant's rights, obtained the legal title from D. J. Brothers. A conveyance from the plaintiff to the defendant is prayed.

"A jury was waived, and the cause was tried by the court, which found specifically that all the material allegations of the answer were true, and as conclusions of law that the defendant was entitled to judgment dismissing the complaint, and a quitclaim deed from the plaintiff to him as prayed in the answer. From the judgment entered thereon the plaintiff appeals."

For the appellant there was a brief by *Hudd & Wigman*, and oral argument by *Mr. Hudd.*

Humphrey Pierce, for the respondent.

CASSODAY, J. The plaintiff gave evidence tending to show a chain of title from the United States to him, through George W. Lawe, of the S. ½ of that part of private claim No. 1, west side of the Fox river, at Kaukauna, Outagamie county, Wisconsin. In support of the defendant's right to

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the possession of the land particularly described, he gave in evidence a tax deed from the county to D. J. Brothers, executed and recorded September 4, 1865, containing only this description: "Private claim No. 1, 642 55-100 acres, less land included in private claims Nos. 34 and 35; also less those tracts formerly described as lot 2, block 2, and lot 4, block 3, Kaukauna plat; also less that part formerly known as lot 1, block 8; also less that part formerly known as block 10, Kaukauna village — 143 acres, sold to Outagamie county for $31.51, except the following tracts: 7½ acres, east of canal, redeemed by M. L. Martin and Fox & Wisconsin Improvement Company; ½ acre, more or less, by Chas. Cord, commencing at the N. W. corner of lot 2, block 13, Kaukauna plat, running thence N. E., on the south line of Canal street, 50 feet, thence S. E. to canal, thence S. W. 150 feet along said canal, thence N. W. to place of beginning; also tract formerly known as lots 17 and 18, block 9, Kaukauna plat, as per deed recorded vol. 7, Deeds, page 26, ½ acre, more or less." The defendant also gave in evidence another tax deed from the county to D. J. Brothers, containing nearly the same description, executed and recorded May 14, 1866. In aid of the description, several records, certificates, documents, etc., were admitted in evidence. A witness, who had been called by the plaintiff, and testified that he was a surveyor, also testified, in effect, that the land in the defendant's possession, and in dispute, was included in the description in each of the tax deeds.

It was urged, on the part of the plaintiff, that the description in each of the tax deeds was so indefinite and uncertain that it described no land whatever, and was therefore void; and also that the extrinsic evidence in aid of the description was improperly admitted. The ambiguity in the description here consists in reference to records, documents, and descriptions outside the deeds, and which were necessarily to be regarded as a part of the description.

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This was a latent ambiguity. In support of the plaintiff's contention that such extrinsic evidence should have been excluded, counsel cite and rely upon *Curtis v. Supervisors*, 22 Wis. 167; *Orton v. Noonan*, 23 Wis. 102; *Delorme v. Ferk*, 24 Wis. 201; *Johnson v. Ashland Lumber Co.* 52 Wis. 458.

In *Curtis v. Supervisors, supra*, the lots, blocks, and addition appeared to be perfectly described on the face of the tax deed, but the recorded plat revealed the fact that there were no such lots and blocks in the addition named. It also appeared from the plat that there were such lots and blocks in a different addition, and it was held that parol evidence was not admissible to show that such different addition was the one intended, instead of the one named in the deed; in other words, that parol evidence was inadmissible to strike from the deed one addition and insert a different addition. *Orton v. Noonan, supra*, was in principle the same. It may be questionable whether the case before us comes within the principle of those decisions.

In *Delorme v. Ferk, supra*, it was held that the description was good under ch. 53, Laws of 1866, notwithstanding it might have been invalid in the absence of that statute. That act provided that "in all advertisements, certificates, papers, or proceedings relating to . . . the assessment and collection of taxes, and proceedings founded thereon, *as well heretofore* as hereafter, *any description of lands* which shall *indicate* the land intended *with ordinary and reasonable certainty*, and which would be sufficient *between grantor and grantee* in an ordinary conveyance, shall be sufficient." Sec. 1047, R. S.; ch. 268, Laws of 1881. Here one of the tax deeds was prior to the passage of the act, and the other after. The objections taken went merely to the mode of proving the land to be within the description, and not to the groundwork and essence of the transaction which resulted in the execution and delivery of the

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deeds. Assuming that, as the law stood prior to that enactment, parol evidence was inadmissible to aid the description, yet the act was obviously intended to be retroactive, and, if valid, clearly authorized the admission of such evidence. It merely provided, in effect, that in tax deeds *theretofore* issued, as well as those thereafter issued, if the description given indicated "the land intended with ordinary and reasonable certainty" it should be sufficient, if it would have been sufficient in an "ordinary conveyance" between grantor and grantee. In other words, that extrinsic evidence should be admissible in the case of such tax deeds, the same as it would be in the case of an ordinary conveyance between grantor and grantee. That the legislature had power to so enact seems to be well established. *Smith v. Cleveland*, 17 Wis. 556; *Selsby v. Redlon*, 19 Wis. 17; *Ehle v. Brown*, 31 Wis. 405. Such being the law, the question of uncertainty in the description in these tax deeds must be determined by the same rules as are applicable to ordinary conveyances between grantor and grantee.

In *Johnson v. Ashland Lumber Co.* 52 Wis. 458, the description in the tax deed was, "lot 3, and the northeast quarter of the northwest quarter, *less seven acres*, of section 5." The difficulty with that description consisted in the impossibility of determining what portion of the forty constituted the seven acres, and as that could not be located with certainty, it was equally impossible to locate the remaining thirty-three acres. Had that exception been "less seven acres," as described in some other record, document, plat, or description, capable of being proved by extrinsic evidence, then what would otherwise be uncertain would, by virtue of such extrinsic evidence, be made definite and certain. For these reasons the case is distinguishable. In *Campbell v. Packard*, 61 Wis. 88, no complete description was given in the deed, nor by reference to anything outside the deed, and hence the case is distinguishable. In *Messer v. Oestreich*, 52 Wis. 689,

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it is said that "deeds are to be construed with reference to the actual rightful state of the property at the time of their execution. . . . For this purpose extrinsic evidence is often admitted, in order to place the court in the position of the parties at the time of making the deed, and thus enable the court to intelligently interpret the language used. The law will not declare a deed void for uncertainty, when the light which contemporaneous facts and circumstances furnish renders the description definite and certain." These positions are abundantly sustained by the authorities there cited. The opinion in that case cites a class of cases in which it was held, in effect, that where the language in the description of the land conveyed, or excepted from the conveyance, is otherwise doubtful, a practical location by the agreement, acts, conduct, or declarations of the parties concerned, followed by adverse and exclusive possession, was sufficient to remove the doubt, and give certainty to the description. 52 Wis. 691. See, also, *Whitney v. Robinson*, 53 Wis. 314, 315; *Parkinson v. McQuaid*, 54 Wis. 484; *McMillan v. Wehle*, 55 Wis. 694, 695. In *McMillan v. Wehle, supra*, the language above quoted was in substance applied to a tax deed executed and recorded August 6, 1856, and hence involved the same question as here presented. Here it appears from the evidence that when the defendant purchased the lot in dispute from D. J. Brothers, the latter sent George W. Lawe, through whom the plaintiff acquired his title, to locate the lot for the defendant, which lot they together did then locate, and thereupon the defendant went into the exclusive possession of the lot, fenced it, built a dwelling-house thereon, in which he lived with his family, and retained such possession to the time of trial. It seems to us that the extrinsic evidence was properly admitted. Under all the evidence we cannot hold that there was such uncertainty in the description as avoided the deed.

It is urged that each of the tax deeds reveals the fact

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that several tracts of land were assessed and sold together for a gross sum only, and in one certificate, and hence that the tax deeds were void upon their face, within the ruling of this court in *Orton v. Noonan*, 25 Wis. 672, and other cases. We are not prepared to say that it so appears. Assuming that it does, the question recurs whether it is available to the plaintiff in this action.

To plead the statute of limitations, it is only necessary to allege in the answer facts showing that a statute of limitation had run against the cause of action alleged in the complaint. *Paine v. Comstock*, 57 Wis. 159; *Smith v. Dragert*, 60 Wis. 139; *Morgan v. Bishop*, 61 Wis. 413, 414. The mere failure to specifically state in the answer the particular statute of limitation relied upon may render the pleading objectionable, as being indefinite and uncertain; but it is not for that reason to be treated as a nullity. *Haseltine v. Simpson*, 58 Wis. 585, 586; *Hiles v. La Flesh*, 59 Wis. 465.

It has been settled by this court that where the tax-title claimant failed to take possession of the premises in time to avail himself of the three-years statute of limitations, yet he might, by an adverse possession for a period of ten years under such deed, though void upon its face, avail himself of the ten-years statute of limitations. Sec. 4211, R. S.; sec. 6, ch. 138, R. S. 1858; *McMillan v. Wehle*, 55 Wis. 685. Since the land in question was included in the tax deeds, it is immaterial whether the deeds were void upon their face or not, if this ten-years statute of limitations was pleadable, and properly pleaded and proved. We think the facts were sufficiently pleaded and proved. True, the answer does not, in express terms, allege that the defendant entered into the possession of the premises under claim of title exclusive of any other right, but we think it does in effect so allege. Moreover, the answer does not in express terms allege that the defendant, at the time of so entering into such possession, founded his claim to the land upon

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some written instrument as being a conveyance of the premises in question; yet as he alleges that D. J. Brothers, at the time named, had the title to the land, and that he purchased of him and immediately went into the adverse and exclusive possession, we think he does in effect so allege. True, the tax deeds under which he so held ran to and were held by D. J. Brothers, but that did not preclude the defendant from founding his claim of title upon such deeds. It is a familiar principle that a vendor may avail himself of the possession of his vendee in order to establish a statutory bar. It is equally true that a vendee in possession under a parol contract may avail himself of the former possession and title deeds of his vendor.

Besides, the defendant had fully paid the purchase price, and held D. J. Brothers' receipt for all of it but a trifle, as early as November 24, 1870. The decision of BUNN, J., in the late case of *Cawley v. Johnson*, 21 Fed. Rep. 492, and the cases there cited by him, goes far towards making the receipt a sufficient written instrument as being a conveyance upon which to found such claim of title, within the meaning of the statute. Certainly the findings and the evidence establish the defendant's equitable title and right to the possession of the land. But we do not put our decision on that ground, as we think the tax deeds were available in support of the defendant's adverse possession and claim of title.

Of course the actual possession of the defendant was notice to the plaintiff and the world as to what the defendant's rights in the land were. *Coe v. Manseau*, 62 Wis. 82. He had paid D. J. Brothers in full, and was, in equity, entitled to a conveyance from him. This being so, the defendant's equitable title would have been a complete defense had an action of ejectment been brought against him by D. J. Brothers. Both Lawe and the plaintiff are conclusively presumed to have known of the defendant's

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equitable title to the land prior to the time when D. J. Brothers conveyed to Lawe, or Lawe to the plaintiff; hence the latter stands in no better position to maintain this action than Brothers would.

There seems to be no valid objection to the defendant's wife testifying, in effect, that by her husband's direction she went to the plaintiff and demanded a deed of the land, and offered to pay him for it. For that purpose she was his agent. But even if it were otherwise, yet as the trial was by the court, and the defendant established his defense without her testimony, it could not work a reversal.

We find no error in the record.

By the Court.— The judgment of the circuit court is affirmed.

MANSON and another, Appellants, vs. THE PHŒNIX INSURANCE COMPANY, Garnishee, etc., Respondent.

September 5 — September 22, 1885.

Chattel mortgage: Insurance money: Garnishment.

A mortgagee of chattels which are insured by a policy providing that the loss shall be payable to him as his interest may appear, is entitled to the insurance money to the amount of the mortgage debt, as against creditors of the mortgagor garnishing the insurance company after a loss, although the mortgage was not properly filed.

APPEAL from the Circuit Court for *Shawano* County.

Garnishment. The garnishee defendant, *The Phœnix Insurance Company of Hartford, Conn.*, answered denying all indebtedness or liability to the principal defendant, Waller. The plaintiffs took issue upon this answer, and upon the trial the court found in favor of the garnishee and rendered judgment dismissing the garnishee proceedings. The plaintiffs appealed. The facts are stated in the opinion.

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For the appellants there were briefs by *Phillips & Forward*, and oral argument by *Mr. Phillips*. They contended, *inter alia*, that the mortgages were void as to the plaintiffs, and as to them the mortgagee had no insurable interest. As to them, therefore, the insurance company was indebted to the defendant Waller. As to them the insurance moneys stand in lieu of the property, and they can reach it as such. R. S. secs. 2313, 2314; *Donaldson v. Johnson*, 2 Pin. 482; *Single v. Phelps*, 20 Wis. 399; *Shepardson v. Cary*, 29 id. 34; *Wallen v. Rossman*, 45 Mich. 333; Jones, Chat. Mortg. sec. 251; *North Star B. & S. Co. v. Ladd*, 32 Minn. 381; *Bernheim v. Beer*, 56 Miss. 149.

For the respondent there was a brief by *Finch & Barber*, and oral argument by *Mr. Barber*.

Cole, C. J. The court below held that at the time of the service of the garnishee summons the garnishee defendant was not indebted to defendant Waller, and did not have any property or money in its possession belonging to him, therefore dismissed the proceeding. The correctness of this ruling is questioned by plaintiff's counsel. The facts upon which the questions of law arise are few and undisputed. It seems that the insurance company issued its policy to Waller, insuring a frame building owned and occupied by him as a saloon, and certain personal property therein. The frame building rested upon blocks and was upon land leased by Waller, who had the privilege of removing it at the expiration of his lease. The building seems to have been treated as a chattel, as it doubtless was. By an indorsement on the policy made when it was issued, the loss was made payable to one Stacy, mortgagee, as his interest might appear. Stacy held chattel mortgages on the building and certain personal property therein. The chattel mortgages were given to secure notes of even date, which were executed for money loaned. This indebtedness,

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beyond all question, was *bona fide*. The mortgages were not filed with the clerk of the city where the mortgagor resided, but with the town clerk of the town of Richmond. This is the only objection to the mortgages. The property was destroyed by fire, and the loss was adjusted before the garnishee proceedings were commenced. At the time of the loss Waller was indebted to Stacy on the notes and mortgages in an amount exceeding the amount of the policy; and Waller gave to Stacy an order on the insurance company for all the moneys payable on the policy, and this order the adjuster of the company agreed to pay. This likewise was before the garnishee proceedings were instituted.

Now the counsel for the garnishee insists and claims that when the loss occurred Stacy became entitled to the insurance money under the clause in the policy making it payable to him, it appearing that the mortgage debt exceeded the amount of the policy. He says, under the decisions in *Appleton Iron Co. v. British Am. Assur. Co.* 46 Wis. 24, and *Hammel v. Queen Ins. Co.* 50 Wis. 240, the legal title of the policy vested upon its execution in the mortgagee as effectually as if it had been subsequently assigned to him. His mortgage debt being greater than the amount of insurance, his interest was the whole interest of the policy. This is certainly the language of those cases. That the mortgagee had an insurable interest in the property does not admit of doubt. "The mortgagor has an insurable interest in the property to the full value of the goods insured; and the mortgagee has an insurable interest measured by the amount for which he holds the mortgage as security. Each, acting independently, may insure his own interest; but the more usual course is for the mortgagor to obtain a policy of insurance payable to the mortgagee in case of loss." Jones, Chat. Mortg. sec. 100; Wood on Ins. sec. 257. The legal title to the personal property passed to the mortgagee,

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by virtue of the mortgage, even before the debt was due. This statement of the law has so often been announced by this court that it requires no reference to the cases which support it. The legal title of the property insured and of the policy being in Stacy, he has an unimpeachable right to the insurance money. In no sense can this money be said, under the circumstances, to belong to the principal debtor, Waller, so as to be liable to garnishment by his creditors; for by its policy the garnishee agreed to pay this money, in case of loss, to Stacy, as his interest might appear, and this was a perfectly valid contract. Consequently, upon the facts, it is clear that the garnishee, when served with process, had nothing in its possession which could be reached by Waller's creditors.

But the counsel for the plaintiffs contend that inasmuch as the chattel mortgages were not duly filed, the right of Stacy to the insurance money was lost, and the creditors of Waller could reach it by garnishment. We do not think this position sound. Though the mortgages were not filed in the proper office, still they were perfectly good as between the parties. The only effect of the failure to duly file the mortgages was to render them invalid as against purchasers or mortgagees in good faith, or creditors who had obtained liens upon the insured property by attachment or levy upon execution. It is said Stacy's right to the insurance money depends upon the stipulation in the policy and his mortgages. This is true. But, the mortgages being good as between the parties, Stacy had an insurable interest in the property, measured by the amount of his *bona fide* indebtedness. He has the right to the insurance money, even as against the plaintiff. We find that this precise point is decided in *Coykendall v. Ladd*, 32 Minn. 529. The head-note clearly states the case as follows: "A creditor proceeded to garnish insurance money claimed to be due his debtor upon the loss by fire of a stock of goods covered by a policy of insurance,

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in which the loss, if any, was made payable to a third party, who appeared as claimant in the proceedings, as 'his interest' should appear. He claimed an interest in the goods by virtue of a chattel mortgage thereon executed by the debtor. Held that, as against the creditor, plaintiff in the garnishment proceedings, such mortgage, if valid on its face and given in good faith, was sufficient to uphold the right of the claimant to the insurance money, to the amount actually due thereon, though the mortgage was never filed for record." In the opinion the learned judge comments on the previous case of *North Star B. & S. Co. v. Ladd*, p. 381, in the same volume, which was cited and relied on by plaintiff's counsel. It will be seen how the cases are distinguished or reconciled by the court. The decision in the *Coykendall Case* seems to us sound in principle, and we adopt it as a correct statement of the law upon the question we have been considering.

Our decision is placed upon different ground from that on which the court below decided it. The learned circuit court held that the order upon the insurance company given to Stacy by Waller after the property was destroyed amounted to an equitable assignment of the fund due upon the policy. Whether Stacy could hold the moneys, if his right to them rested on this order alone, is a question we need not decide. It is quite plain that his right to these moneys, under the policy and the mortgages, was not weakened by this order. But as his claim was good and valid without it, we need not consider what his rights would have been if they depended upon the order alone.

By the Court.—The judgment of the circuit court is affirmed.

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THE KNAPP, STOUT & CO. COMPANY, Appellant, vs. DEITZ, Respondent.

September 5 — September 22, 1885.

CHATTEL MORTGAGES. *(1) Uncertainty in description. (2) Chattels to be consumed by mortgagor.*

1. The description of property in a chattel mortgage as "Forty-one Berkshire hogs and sixty-five grain-sacks," is not so uncertain as to invalidate the mortgage.
2. A mortgage of chattels furnished by the mortgagee to the mortgagor and to be used and consumed by him for the benefit of the mortgagee, is not void as to the creditors of the mortgagor. *Place v. Langworthy*, 13 Wis. 629, and *Steinart v. Deuster*, 23 id. 136, distinguished.

APPEAL from the Circuit Court for *Barron* County.

The defendant was duly appointed a special deputy by the sheriff of Barron county to serve an execution issued out of the circuit court of that county against the property of one Lesure, the judgment debtor named therein. He thereupon levied such execution upon a large amount of personal property as the property of Lesure. The plaintiff claims such property, and brought this action to recover possession of the same. No questions are raised on the pleadings.

There was a trial of the action before a jury, which resulted in a verdict for the plaintiff for the recovery of a large portion of the property in controversy, and for the defendant for the recovery of the remainder thereof, consisting of forty-one hogs and sixty-five grain-sacks. The verdict was substantially directed by the court. A motion on behalf of the plaintiff for a new trial was denied, and judgments for the plaintiff for the property so recovered by it, and for the defendant for the property so recovered by him, were duly entered. The plaintiff appeals from the judgment for the defendant.

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The cause was submitted for the appellant on the brief of *Hunt & Freeman*, and for the respondent on that of *Ives & Ticknor*.

For the appellant it was argued, among other things, that the description in the mortgage was sufficient, the property having been identified by parol evidence. *Sargent v. Solberg*, 22 Wis. 132; *Harris v. Kennedy*, 48 id. 500, and cases cited; *Conklin v. Shelley*, 28 N. Y. 360; *Russell v. Winne*, 37 id. 591; *Willey v. Snyder*, 34 Mich. 60; *Fordyce v. Neal*, 40 id. 705; *Kelley v. Reid*, 57 Miss. 89; *Nicholson v. Karpe*, 58 id. 34. The question of identification was one for the jury. *Whitaker v. Burhans*, 65 N. Y. 559; *Van Vechten v. Hopkins*, 5 Johns. 211. Since the use of the property was to be for the benefit of the mortgagee rather than for the mortgagor, the fact that the property was to be consumed does not show an intent on the part of the mortgagor to hinder, delay, or defraud his creditors. See *Ravisies v. Alston*, 5 Ala. 297; *Planters' & M. Bank v. Clarke*, 7 id. 765; *Masson v. Anderson*, 3 Baxt. 290; *Dewey v. Littlejohn*, 2 Ired. Eq. 495; *Young v. Booe*, 11 Ired. Law, 347; *Cochran v. Paris*, 11 Gratt. 348; *Sipe v. Earman*, 26 id. 563; *Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Sommerville v. Horton*, 4 Yerg. 541; *Simpson v. Mitchel*, 8 id. 417; *Farmers' Bank v. Douglas*, 11 Sm. & Mar. 469; *Place v. Langworthy*, 13 Wis. 629; *Steinart v. Deuster*, 23 id. 136; *Barkow v. Sanger*, 47 id. 500; *Rice v. Jerenson*, 54 id. 248; *Cotton v. Marsh*, 3 id. 221; *Fisk v. Harshaw*, 45 id. 665.

LYON, J. The plaintiff claimed a part of the property in controversy as owner, and the balance thereof under two chattel mortgages executed to it by Lesure, the judgment debtor in the execution by virtue of which the defendant seized such property. The plaintiff made good his claim to most of the property, to the satisfaction of the court, and recovered the same. Its judgment therefor is not affected

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by this appeal. The only question to be here determined is, Does the evidence justify the direction of the court to the jury to find for the defendant in respect to the remainder of the property claimed, to wit, forty-one hogs and sixty-five grain-sacks? This property was covered by one of the chattel mortgages. The record does not expressly state the grounds for such direction, but it is quite apparent therefrom that it must have been predicated upon one or more of three assumed grounds: (1) The mortgage was not filed with the clerk of the proper town; or (2) the description therein of the mortgaged property is so uncertain that it renders the mortgage null and void; or (3) the property therein described consists mainly of supplies, and the understanding was that the mortgagor should use such supplies; and this operates to defraud other creditors of the mortgagor, and invalidates the mortgage. These assumed grounds will be briefly considered in their order.

1. The testimony of Lesure tends to show, if it does not prove the fact conclusively, that he resided in the town of Stanfold, in Barron county, when he executed the mortgage in question. It was filed with the town clerk of that town before the defendant made the seizure complained of. The court could not, therefore, properly assume that the mortgage was not filed with the clerk of the proper town. R. S. sec. 2314.

2. The hogs are described in the mortgage as "Berkshire hogs." The testimony shows, or at least tends to show, that the mortgage covers and includes all the hogs and grain-sacks the mortgagor owned. The description of the property in the mortgage is about as specific as the nature of the property will allow. One hog is very much like another hog of the same breed, and one grain-sack is apt to be much like another. These belong to a large class of articles which it is difficult to describe except by name and variety. We do not think it ought to be held that the

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description of this property in the mortgage is so uncertain as to render the mortgage void as to such property. We apprehend the property might be found and identified without much difficulty, if a little diligence were used in that direction. *Id certum est quod certum reddi potest.*

3. The supplies were furnished Lesure to enable him to get out a quantity of logs for the plaintiff at a stipulated price, under a contract between them. To perform his contract it was necessary for him to employ and subsist a large number of men and teams. The mortgage on the supplies was given to secure a large indebtedness due from Lesure to the plaintiff. Presumably the plaintiff gave Lesure the logging job to enable him to reduce that indebtedness. Without supplies he could not perform his contract. Hence the plaintiff had a direct interest in having the supplies used, and they were used for its benefit rather than for the benefit of the mortgagor. The rule established in *Place v. Langworthy*, 13 Wis. 629, and *Steinart v. Deuster*, 23 Wis. 136, is to the effect that any agreement between mortgagor and mortgagee of chattels, that the former may sell them and apply the proceeds to his own use in the support of his family, or otherwise, renders the mortgage fraudulent in law and void as to the creditors of the mortgagor. We have no case here for the application of that rule.

In any view in which the case is presented to our minds, we are unable to find in the evidence any sufficient grounds for the direction to the jury to find for the defendant as to the hogs and grain-sacks. For such erroneous directions the judgment for the defendant must be reversed, and the cause remanded for a new trial of that branch of the case.

By the Court.— It is so ordered.

See note to this case in 24 N. W. Rep. 472; also, *Peterson v. Fole*, 25 N. W. Rep. (Iowa), 677; *Caldwell v. Trowbridge*, 26 id. (Iowa), 49.— REP.

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FUNK, Appellant, vs. PAUL, Respondent.

September 7 — September 22, 1885.

CHATTEL MORTGAGES. *(1) Domestic animals: Increase. (2) Who is a* "bona fide *purchaser.*"

1. Where domestic animals are mortgaged during the period of gestation, the offspring when born will, as between the parties to the mortgage, be covered thereby; but as against a *bona fide* purchaser or incumbrancer acquiring his title or lien without notice of the facts and after the period of nurture has passed, such offspring will not be covered by the mortgage.
2. One who takes a mortgage of chattels to secure a pre-existing debt which is not yet due, and without any new consideration, is not entitled to protection as a *bona fide* purchaser or incumbrancer.

APPEAL from the Circuit Court for *Rock* County.

The case is thus stated by Mr. Justice CASSODAY:

"The following facts appear from the record:

"January 3, 1883, one Peter Gleim borrowed of the defendant $750, and gave to him therefor his note for the amount, due in one year, secured by chattel mortgage on certain personal property therein described, including 'six (6) milch cows' in Gleim's possession, on his farm, by that description, and no other. That mortgage was duly filed in the proper office on the day it was given. Four of the cows were with calf, and dropped their calves in April, 1883. These four cows and their four calves remained in Gleim's possession until in March, 1884.

"Gleim being indebted to the plaintiff on a note for $225, given in January, 1883, and due in January, 1884, to secure the same, and at the plaintiff's request, did, October 8, 1883, execute and deliver to the plaintiff a chattel mortgage on certain personal property therein described, including 'five spring calves' in the possession and on the farm of Gleim, and these calves included the four calves above mentioned, which mortgage was duly filed in the proper

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office on the day it was given; and the only consideration therefor was the prior indebtedness on said note, and that was a *bona fide* indebtedness.

"In March, 1884, Gleim having given two other chattel mortgages, which were duly filed, to other parties, upon his personal property, upon some of which they were first liens and upon the balance subsequent liens, ran away, leaving the property on his farm. Thereupon a constable, acting as agent for all the mortgagees, took possession of all the property then on the farm covered by any of the mortgages, and, after having advertised the same, sold all the property at public sale. At such sale, by an arrangement made by all the mortgagees, the defendant acted as treasurer, and received all the moneys and proceeds of the property sold. After the sale the mortgagees came together, and after paying from the proceeds the expenses of sale, settled among themselves the fractional shares of such moneys and proceeds to which they were severally and of right entitled, and such shares were severally paid over to them respectively by the defendant, except that both the defendant and the plaintiff claimed the net proceeds of the four calves mentioned, amounting to $66, which sum the defendant refused to pay over to the plaintiff, but claimed it as his own under his chattel mortgage. All the moneys and property retained by the defendant, including the $66, were insufficient to pay up the amount due on his note and mortgage. It was not necessary for a calf to follow a cow for nurture more than four months, and these calves, shortly after they were dropped, were kept by Gleim in a lot by themselves, separate from the cows, until after the plaintiff's mortgage was given. The plaintiff, at the time of taking his mortgage, had no actual notice of any prior mortgage.

"To recover the $66 so retained by the defendant this action was brought. In the justice's court the plaintiff ob-

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tained judgment, but on appeal the circuit court, upon the facts stated, gave judgment for the defendant. From that judgment the plaintiff appeals."

Charles M. Scanlan, for the appellant, contended, *inter alia*, that the mortgage to the defendant did not cover the increase of the cows. The property mortgaged must be in *actual existence* when the mortgage is given, and "actual existence" does not cover the period of gestation. *Comstock v. Scales*, 7 Wis. 159; *Winter v. Landphere*, 42 Iowa, 471; *Single v. Phelps*, 20 Wis. 398; *Muir v. Blake*, 57 Iowa, 662; *Mowry v. White*, 21 Wis. 417; Jones, Chat. Mortg. secs. 55, 149, 150. The mortgagor is not only entitled to the increase but also has an interest in the property originally mortgaged which he may sell or mortgage. *Cotton v. Watkins*, 6 Wis. 629; *Frisbee v. Langworthy*, 11 id. 375; *Shepardson v. Green*, 21 id. 539; Benjamin on Sales, sec. 320, note; *Appleton Iron Co. v. B. A. Ass. Co.* 46 Wis. 23. Attempting to mortgage the increase would be no more than giving to the mortgagee a contract for a mortgage, or a license to take possession of the property when it should be in actual existence, which the mortgagor could revoke at pleasure. In this case if Gleim had given such license to the defendant he revoked it by giving the mortgage to the plaintiff. *Chynoweth v. Tenney*, 10 Wis. 397; *Oliver v. Town*, 28 id. 328; *Farmers' L. & T. Co. v. Comm. Bank*, 11 id. 207; *Morrow v. Reed*, 30 id. 81; *Montgomery v. Chase*, 30 Minn. 132; *Lamson v. Moffat*, 61 Wis. 153; *Lormer v. Allyn*, 64 Iowa, 725; *Case v. Fish*, 58 Wis. 56; Jones, Chat. Mortg. secs. 119, 161–2, 164. That the filing of a chattel mortgage may operate as notice, the description of the property therein must be clear, specific, and in terms cover all that is intended to be mortgaged. Jones, Chat. Mortg. secs. 55, 149, 150, 236; *Winter v. Landphere*, 42 Iowa, 471; *Miller v. Miller*, 63 id. 387; *Manufacturers' Bank v. Rugee*, 59 Wis. 221; *Fowler v. Hunt*, 48 id. 345; *Morrow v. Reed*, 30 id. 81; *Clay v. Currier*, 17

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N. W. Rep. 760; *Hayes v. Wilcox*, 61 Iowa, 732; *Everett v. Brown*, 64 id. 420; *Montgomery v. Chase*, 30 Minn. 132. The mortgage must show on its face that the mortgagor intended to include the increase. Jones, Chat. Mortg. secs. 67, 167; *Lormer v. Allyn*, 64 Iowa, 725; *Carr v. Allatt*, 27 L. J. (Exch.) 385; *Farmers' L. & T. Co. v. Comm. Bank*, 15 Wis. 424.

B. F. Dunwiddie, for the respondent, to the point that a mortgage of a cow with calf would cover the calf when born, as between mortgagor and mortgagee, cited *Arnold v. Stock*, 81 Ill. 407; *Gundy v. Biteler*, 6 Bradw. 510; *Hughes v. Graves*, 1 Litt. (Ky.), 317; *Thorpe v. Cowles*, 55 Iowa, 408; *Fowler v. Merrill*, 11 How. 375; *Forman v. Proctor*, 9 B. Mon. 124; *Evans v. Mirriken*, 8 Gill & J. 39; *McCarty v. Blevins*, 5 Yerg. 195; Herman, Chat. Mortg. sec. 44; *Kellogg v. Lovely*, 46 Mich. 131. The plaintiff was not an innocent purchaser for value, the only consideration for his mortgage being an antecedent debt. He can, therefore, claim no other protection than the mortgagor himself. *Bowman v. Van Kuren*, 29 Wis. 209; *Woodburn v. Chamberlin*, 17 Barb. 446; *Van Slyck v. Newton*, 10 Hun, 554; *Tiffany v. Warren*, 37 Barb. 571; *Jones v. Graham*, 77 N. Y. 628; *Cary v. White*, 52 id. 138; 2 Pomeroy's Eq. Jur. secs. 748–9.

Cassoday, J. It has long been settled that "a grant of that which a grantor has potentially, though not actually, is good." *Grantham v. Hawley*, Hob. (132) 286; *Fonville v. Casey*, 1 Murph. 389; *S. C.* 4 Am. Dec. 559; *McCarty v. Blevins*, 5 Yerg. 195; *S. C.* 26 Am. Dec. 262. In this state a chattel mortgage given upon a crop of grain at or about the time it is sown, and before it is up, or has any appearance of a growing crop, is wholly inoperative upon such crop when grown. *Comstock v. Scales*, 7 Wis. 159; *Lamson v. Moffat*, 61 Wis. 153. But where such chattel mortgage

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has been given after the seed sown has sprouted and made its appearance above the ground as a growing crop, there can be no doubt but what it is operative and covers the grain when it comes into existence as the product or as an accession to what was growing when the mortgage was given and covered by it. *Bryant v. Pennell*, 61 Me. 108; *Conderman v. Smith*, 41 Barb. 404.

On the same principle, where the owner of a domestic animal gives a mortgage thereon during the period of gestation, the mortgagee will, as against the mortgagor, be entitled to the offspring when born. *McCarty v. Blevins, supra; Conderman v. Smith, supra; Hughes v. Graves*, 1 Litt. (Ky.), 317; *Evans v. Merriken*, 8 Gill & J. 39; *Forman v. Proctor*, 9 B. Mon. 124; *Fowler v. Merrill*, 11 How. 375, 396; *Kellogg v. Lovely*, 46 Mich. 131.

But it is urged that notwithstanding the mortgage may cover the calves, as between the parties, yet that as they are not described nor in any way referred to in the defendant's mortgage, the filing of it was not constructive notice to the plaintiff, and hence that his mortgage gives him the superior right. Had the defendant, upon obtaining his mortgage, taken possession of the cows, and retained them, and the calves, when dropped, until after the plaintiff obtained his mortgage, then he undoubtedly could have held them as against the plaintiff. By reason of such possession the plaintiff and the world would have been conclusively presumed to know the defendant's interest in and right to the calves. Our statute authorizes the filing of the mortgage in lieu of such possession, and as equivalent to it. Sec. 2313, R. S. Such filing is constructive notice to third parties, subsequently dealing with the property, as to the rights and interest of the mortgagee in the property mortgaged. Such constructive notice is, of course, co-extensive with the contents of the mortgage so filed. But, from the very nature of things, it cannot be constructive notice of

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facts existing *dehors* the mortgage and in no manner referred to in it, unless the contents of the mortgage, together with the facts and circumstances connected with the mortgaged property or its possession, are such as to give actual or constructive notice of the rights of the mortgagee to those subsequently dealing with the property; or, at least, sufficient to put them upon inquiry. While the calves were following the cows for nurture, it may be that a person acquiring an interest in them by purchase or mortgage would be presumed to know that the mortgage was given during the period of pregnancy.

In *Forman v. Proctor*, 9 B. Mon. 124, it was held "that the first mortgage . . . must be regarded as covering and including, *for a reasonable time*, the produce or descendants of the female animals conveyed by the mortgage, these being incident to the legal title and the right of immediate possession vested in the mortgagee, for whom the mortgagor holds the possession." The "reasonable time" mentioned manifestly meant the period during which the young followed their mothers for nurture. In *Winter v. Landphere*, 42 Iowa, 471, the mortgagor sold the calves when they were eighteen months old, and the court said "the time had passed when it was necessary for their nurture to permit them to follow the cows. At such time it is unnatural to separate the calf from its dam, when it is not taken to the butcher. The two are then usually disposed of together. It may be that during that time the law would regard the calf as covered by a mortgage upon the cow. . . . A description which will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property conveyed is sufficient. Nothing short of this will import notice to purchasers." To the same effect is *Thorpe v. Cowles*, 55 Iowa, 408.

The case of *Winter v. Landphere*, *supra*, is cited approvingly in *Darling v. Wilson*, 60 N. H. 59; *S. C.* 49 Am. Rep.

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305. But the court in this last case goes further and declares that "there being nothing in the mortgage showing an intention to create a lien upon the increase of stock mortgaged, the lien existing only as an incident to the mortgage, would, *as between the parties*, continue *so long only* as is necessary for the suitable nurture of the increase. This view is supported upon sound principles." To our minds this view cannot be sustained upon sound principles. The lien was created by the mortgage, and, so far as the mortgagor is concerned, was entirely independent of the nurture. The mortgage was a valid lien upon the increase, as against the mortgagor in possession, and he necessarily knew, when the mortgage was given, the young dropped, and the period of gestation, and hence there would seem to be no valid reason for terminating the lien, as against the mortgagor, merely because the period of "suitable nurture" had passed. Such nurture did not give the lien, and its termination could not take it away as against the mortgagor. As to such mortgagor the question of notice or insufficiency of description is not involved, for he had actual notice that such increase was, in fact, covered by the mortgage. But as to subsequent *bona fide* purchasers and mortgagees without notice the question is different. As to them, the period of nurture being passed, and the young being entirely separated from the mother, and not being mentioned in the mortgage, nor any longer connected with the mother covered by the mortgage, they have neither actual nor constructive notice of the mortgagor's rights and interests, nor anything to put them upon inquiry.

In the case before us the period of nurture had passed, and the calves were kept by the mortgagor in a field separated from the cows, so that a *bona fide* purchaser or mortgagee without notice would have been protected. Was the plaintiff such mortgagee? He took the mortgage to secure an indebtedness incurred many months before and not yet due, and without any new consideration. The mortgage,

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though requested, was purely voluntary, and gave the mortgagee no greater right or interest in the calves than the mortgagor possessed. *Bowman v. Van Kuren*, 29 Wis. 209; *Body v. Jewsen*, 33 Wis. 409; *Bay v. Coddington*, 5 Johns. Ch. 54; *S. C.* 9 Am. Dec. 268; *Atkinson v. Brooks*, 26 Vt. 569; *S. C.* 62 Am. Dec. 592. To constitute a *bona fide* purchaser or mortgagee, there must not only be an absence of notice, but also a payment of, or fixed liability for, the consideration. *Nantz v. McPherson*, 7 T. B. Mon. 597; *S. C.* 18 Am. Dec. 216; *Cummings v. Coleman*, 7 Rich. Eq. 509; *S. C.* 62 Am. Dec. 402; *Wynn v. Carter*, 20 Wis. 107.

By the Court.—The judgment of the circuit court is affirmed.

RHINEHART, Respondent, vs. WHITEHEAD and another, Appellants.

September 7 — September 22, 1885.

ASSAULT AND BATTERY. *(1) Evidence of other fights. (2) Expert testimony. (3) Joint tort-feasors: Actual participation. (4) Justification: Burden of proof.*

PLEADING. *(5) General denial: Admissions.*

1. Where the assault and battery complained of were part of one preconcerted affray, evidence of the circumstances of other fights engaged in by the defendants in the execution of their unlawful purpose, is admissible.
2. The plaintiff having been bitten in the thumb by one of the defendants, a medical expert who had examined the wound might properly be asked to state the tendency or danger "of that kind of a wound."
3. A person who goes to a place with others with the intent to get up a fight with persons there, may be liable for an assault and battery committed in the execution of that purpose, although he did not actually participate in such assault.
4. Where the defendant in an action for an assault and battery pleads in justification the burden is upon him to prove such justification.
5. The admission of a fact in an answer is available to the plaintiff, although the answer also contains a general denial.

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APPEAL from the Circuit Court for *Green* County.

Action to recover damages for an assault and battery alleged to have been committed upon the plaintiff by the defendant *Levi Whitehead* by the advice and persuasion of his father, the defendant *Henry Whitehead*, who was present aiding and abetting in the assault. The plaintiff was a member of a brass band which, on the evening of the alleged assault, met for practice in the school-house of the district in which the defendants resided. The substance of the defendants' answer is stated in the opinion.

At the trial after the defense had rested, a witness, Charles Estel, called by the plaintiff in rebuttal, was allowed to testify as to a conversation with *Henry Whitehead* a short time before the trial, the court ruling that it was admissible so far as it tended to contradict what *Mr Whitehead* had testified. A witness, Frank Keel, also called in rebuttal, was allowed to testify as to the circumstances of one of the other fights which were going on at about the same time as the one between the plaintiff and *Levi Whitehead*. Other evidence given at the trial and the instructions to the jury, so far as they are essential to an understanding of the questions determined, will be found in the opinion.

There was a verdict for the plaintiff assessing his damages at $500, and from the judgment entered thereon the defendants appealed.

B. Dunwiddie and *W. E. Carter*, for the appellants.

P. J. Clawson, for the respondent.

COLE, C. J. After a careful examination of the bill of exceptions, we fail to discover any error in this case which should reverse the judgment. There is much conflict in the testimony, and it is not easy to get at the real facts. But the evidence as given on both sides, and the law applicable to it, seem to have been fairly submitted by the court below in its charge.

It is objected on the part of the defendants that improper

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testimony was admitted on the trial. For instance, it is said it was error for the court to permit evidence to be introduced, against defendants' objection, as to other fights than the one between the plaintiff and defendants, especially the testimony as to how the fight between "Ed." Whitehead and Homer Ullom began, and the particulars of that fight. But it is indisputable that there were a number of fights going on at the same time, or in quick succession, between persons at the school-house. It was difficult to separate them, or to get the slightest idea of one without going into the history of others. They seem to be parts of one general preconcerted affray. The theory of the plaintiff about the transaction was that *Henry Whitehead*, together with his sons and some others, went to the school-house on the evening in question with the intent of getting up a quarrel with the "band boys," or some persons they expected to find there, and whip them. If there was an unlawful combination on the part of *Henry Whitehead* and others with him to do such a wrongful act, whatever was said or done in the execution of that purpose was material and pertinent. The learned counsel for the defendants would not probably dispute the correctness of this proposition; but their contention is that there was no evidence of any such unlawful combination or conspiracy entered into before the defendants went to the school-house. All we have to say upon that point is that we think there was sufficient evidence of such a combination to carry the question to the jury. In that view all this evidence objected to was admissible.

Another error assigned is that it was improper to permit Dr. Confer to testify, against defendants' objection, as to the tendency or danger of wounds by bites in general, instead of confining the testimony to the actual danger of this wound, and the extent of the injury it had caused. The doctor had seen and examined this wound on plaintiff's thumb, and he was asked to state, from his experience and

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observation as a physician, the tendency or danger *of that kind of a wound.* He only testified as to the general or probable consequences of such an injury, which we suppose was proper. The injury to the thumb was caused by a bite by one of the defendants, and the question related to the general tendency or probable consequences of a bite by a human being on that part of the hand, and did not refer to bites by animals or reptiles. It seems to us the question was entirely proper in the form it was put.

We are unable to see any objection to the ruling of the court in allowing the witnesses Estel and Keel to testify to what they did, when called in rebuttal.

As to the rule of liability where several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly show them to be joint tort-feasors, the court gave the law substantially as laid down in *Brown v. Perkins*, 1 Allen, 89, which was cited with approval by this court in *Hilmes v. Stroebel*, 59 Wis. 74. That is to say, the court instructed that "any person who is present at the commission of an assault, or an assault and battery, by one person upon another, encouraging or inciting the same by words, gestures, looks, or signs, or who in any manner or by any means countenances or approves the same, is in law deemed an aider and abettor, and liable as principal; and evidence that a person is present at the commission of an assault and battery, without disapproving or opposing it, is evidence from which, in connection with other circumstances, the jury may infer that he assented thereto, and lent to it his countenance and approval, and was thereby aiding and abetting the same. But it is to be borne in mind that mere presence at the commission of an assault and battery or other wrongful act done, does not render a person liable as a participator therein." The learned counsel insists that this charge should have been qualified in order to make it

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applicable to the case, and should have been: "If a person is present at the commission of an assault and battery, knowing that it is or is about to be committed, without disapproving or opposing it, this is evidence from which, in connection with other circumstances, his assent or participation in the act may be inferred." No such qualification of the charge was asked for on the part of the defendants.

The instruction was surely applicable to one phase of the case. If there was an intent and purpose on the part of *Henry Whitehead*, and those with him, to go to the school-house and get up a fight with persons there, it was not necessary that he should actually aid his co-defendant in the assault and battery of the plaintiff. He would be equally liable in such a case as though he had committed the battery himself. But the court, in effect, further said, if there was no unlawful combination or purpose of that kind, the mere presence of *Henry Whitehead*, without doing something, by word or act or gesture, denoting his countenance or approval, would not render him liable. In view of much of the testimony introduced on the trial, the charge on this point is unobjectionable. It was surely as favorable to the defendants as the law would justify. There was enough in the case to authorize the jury in finding,—as they probably did under the charge,—that *Henry Whitehead*, and others with him, were engaged in a common unlawful act, and that whatever was done in the execution of their purpose had his full sanction.

A further error is assigned, which is that this is not a case for exemplary damages. This point seems to us so plainly untenable that it requires no comment.

The defendants put in a joint answer, consisting (1) of the general denial; (2) that *Levi Whitehead* admits he struck plaintiff, but alleges that plaintiff first assaulted and struck him, and that he used only such force as was reasonable

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and necessary in defending himself against plaintiff's assault; and (3) *Henry* denies that he advised his co-defendant *Levi* to assault the plaintiff, or aided him in any manner. The other parts of the answer are immaterial. In this state of the pleadings the court charged very distinctly that the burden of proof was upon the party who had the affirmative of the issue, and that it was incumbent upon the plaintiff to prove that *Levi Whitehead* assaulted and struck him and bit his thumb, and that *Henry Whitehead* advised, encouraged, and induced *Levi* to commit these injuries before they were inflicted, and that *Henry Whitehead* was also present when the injuries were committed by *Levi*, and aided and abetted in the commission of them. In respect to the justification set up by *Levi*, the court charged that as to that issue the burden of proof was upon the defendants. We do not see any error in this charge. Counsel say that the plaintiff was bound, under the answer, to prove his entire case, which we think he did do, for the case seems to have been tried without any regard to which side had the burden of proof. And the court clearly separated the defenses of the defendants in his direction to the jury. But we suppose as to the justification the *onus* was upon the party relying on that defense. We do not quite comprehend the position of counsel when they say that, even so far as *Levi* was concerned, the answer does not admit that he struck the plaintiff. If that admission is not in the answer we do not understand it. But the admission is certainly in the answer, and the plaintiff might have availed himself of the admission though the answer contained the general denial (*Sexton v. Rhames*, 13 Wis. 99; *Hartwell v. Page*, 14 Wis. 50; *Farrell v. Hennesy*, 21 Wis. 632); but he did not see fit to do so.

On the whole record we think the judgment is correct, and must be affirmed.

By the Court.—Judgment affirmed.

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HECKMAN, Appellant, vs. SWARTZ, Respondent.

September 7 — September 22, 1885.

(1, 2) Criminal law and practice: Clerical mistake in warrant: Insufficient complaint: Fornication: Legality of arrest. (3–5) Duress: Criminal prosecution to force settlement: Recovery of money paid: Voluntary payment.

1. A warrant for arrest issued in March, 1878, and stating that the offense was committed on May 20, 1878, instead of on May 20, 1877, as charged in the complaint, is not invalid. The mistake could not mislead, and the warrant might be amended.
2. A criminal complaint attempted to charge the offense of fornication, but failed to state that the woman was unmarried. The validity of the warrant issued thereon being called in question in an action to recover money alleged to have been paid under duress of imprisonment, *held*, that the omission of such statement did not invalidate the warrant or render the arrest illegal.
3. Although an arrest may be for a just cause and under valid process, yet if it be for an illegal purpose, and the person arrested pays money for his release, he may recover it back as having been paid under duress of imprisonment.
4. But if such money was paid by the plaintiff voluntarily and after the duress and the influence thereof had ceased, it cannot be recovered.
5. Under duress of imprisonment on a charge of fornication with defendant's daughter, made by the defendant for the purpose of forcing a settlement, the plaintiff agreed to pay money to the defendant. In pursuance of such agreement he executed his notes and a mortgage to M., and M. executed his notes to the defendant, the latter on his part executing a release to the plaintiff. The mortgage was to be signed by plaintiff's wife and the release by defendant's daughter; and the instruments were deposited with C. to be delivered by him to the persons respectively entitled thereto after such signatures should be obtained. They were afterwards so delivered, the defendant accepting the notes of M. as payment of the sum agreed to be paid by the plaintiff. After delivery of the instruments to C., but before delivery by him to the respective parties, the plaintiff was released. *Held*, that the plaintiff, having fully performed the agreement on his part before the duress had ceased, might recover from the defendant the amount paid on the settlement.

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APPEAL from the Circuit Court for *Green* County.

This action was brought to recover $1,635, alleged to have been obtained from the plaintiff by the defendant, by duress of imprisonment upon a void warrant issued upon complaint of the defendant falsely charging the plaintiff with having committed the crime of fornication with one Mary Jane Swartz, the daughter of the defendant, and by threats of future and further prosecutions therefor. The case has heretofore been twice before this court: once on an appeal from an order sustaining a demurrer to the complaint, and again on an appeal from an order overruling a demurrer to a counterclaim set up in the answer of the defendant. Both orders were reversed by this court. 50 Wis. 267; 55 Wis. 173. A statement of the complaint will be found in the case reported in 50 Wis. 267.

After the determination of those appeals the cause was tried, and a special verdict returned by the jury. The plaintiff moved on such verdict for judgment against the defendant. The motion was denied. The plaintiff then interposed a motion to set aside the verdict, and for a new trial, which motion was also denied, and the court thereupon gave judgment for the defendant. The special verdict sufficiently indicates the questions of fact litigated on the trial. It is in the form of interrogatories put to the jury and their answers thereto. These are as follows:

"1. Is the affidavit made by the defendant before S. W. Abbott, Esq., as well as the warrant issued by said justice, correctly set forth in the plaintiff's complaint in this action? It is.

"2. Was the plaintiff arrested on the said warrant by the sheriff of Green county? He was.

"3. When the defendant applied to Justice Abbott for a warrant of arrest, was it to have him arrested for bastardy or fornication? For bastardy.

"4. Did the plaintiff or Justice Abbott suggest that the

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complaint should be made and the warrant issued for fornication instead of bastardy? Justice Abbott.

"5. On being arrested, was the plaintiff handcuffed by the sheriff? He was.

"6. Was the plaintiff handcuffed by the sheriff at the request of the defendant? He was not.

"7. Did the sheriff, at the time he arrested the plaintiff, use unnecessary force or violence in so doing, or try in any way to frighten and intimidate him? He did not.

"8. Was the plaintiff, on arriving at Monroe, taken at once to the jail after being arrested? He was.

"9. Was he so taken to the jail at the instance and request of the defendant, or on the sheriff's own motion? Sheriff's own motion.

"10. How long was the plaintiff confined in the jail under said arrest? About four and one-half hours.

"11. Was the plaintiff, by reason of his arrest and imprisonment, induced to make the settlement in question, contrary to his own free will? He was not.

"12. Was the plaintiff, while he was under arrest, induced to make said settlement against his own free will by threats of the defendant that if he did not settle he would prosecute him and send him to the state's prison for his conduct with the defendant's daughter? He was not.

"13. Was the plaintiff compelled to make the settlement in question by fear of death or great personal injury to him, caused by any threats or menaces of the defendant? He was not.

"14. Did the defendant institute the criminal proceedings against the plaintiff for the purpose of compelling him to make the settlement in question? He did.

"15. Did the defendant, at the instance of Justice Abbott, make complaint against the plaintiff, and then cause his arrest in order to prevent his escape from the state, and under the belief that he was about to remove from the

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state, so that he could not be arrested for bastardy? He did.

"16. Was the note of the Musser Bros. for $2,050 delivered by the plaintiff to the defendant before or after he was released from arrest and imprisonment? After."

The plaintiff appeals from the judgment.

B. Dunwiddie and *B. F. Dunwiddie*, for the appellant, argued, among other things, that where there is an arrest for an improper purpose without just cause, or an arrest for just cause but without lawful authority, or for just cause but for an unlawful purpose even though under process, it is duress of imprisonment; and if the person arrested, and under any of these species of duress, execute a contract or pay money for his release, he may avoid such contract and recover back the money so paid in assumpsit. *Bush v. Brown*, 49 Ind. 573; *Watkins v. Baird*, 6 Mass. 506; *S. C.* 4 Am. Dec. 170; *Brooks v. Berryhill*, 20 Ind. 97; *Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*, 8 id. 386; *Tilley v. Damon*, 11 Cush. 247; *Foshay v. Ferguson*, 5 Hill, 154; *Fisher v. Shattuck*, 17 Pick. 252; *Strong v. Grannis*, 26 Barb. 122; *Hackett v. King*, 6 Allen, 58; *Richards v. Vanderpool*, 1 Daly, 71. Fornication is a statutory offense and must be charged in the words of the statute, the woman being alleged to be single. Bishop, Stat. Cr. secs. 692–3; 2 Wharton, Cr. Law (7th ed.), sec. 2668; *State v. Shear*, 51 Wis. 460; *Comm. v. Murphy*, 2 Allen, 163. The complaint failing to charge an offense, the justice had no jurisdiction to issue any warrant. The warrant is void for the same reason, and for the further reason that it alleges the offense to have been committed at a date two months subsequent to the date of the warrant itself. *Comm. v. Doyle*, 110 Mass. 103; *State v. Noland*, 29 Ind. 212; *Collins v. State*, 58 id. 5; *Lanham v. State*, 9 Tex. App. 232; *State v. Litch*, 33 Vt. 67.

John Winans, for the respondent, to the point that the

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payment having been *voluntarily* made in consideration of an agreement that the defendant would not prosecute the plaintiff for any criminal offense, the latter cannot recover, cited *Shultz v. Culbertson*, 46 Wis. 313; *Miller v. Larson*, 19 id. 463; *Elston v. Chicago*, 40 Ill. 514; *Patterson v. Cox*, 25 Ind. 261; *Roll v. Raguet*, 4 Ohio, 418; 12 id. 545; *Greenwood v. Curtis*, 6 Mass. 381; *White v. Buss*, 3 Cush. 449; *Merwin v. Huntington*, 2 Conn. 209; *Daimouth v. Bennett*, 15 Barb. 541; 37 id. 343; 58 id. 165.

LYON, J. I. A proposition urged on behalf of the plaintiff will first be considered, as the determination of it has, or may have, an important bearing upon the case. It is alleged in the complaint, and was maintained in argument by counsel for the plaintiff, that neither the warrant upon which the plaintiff was arrested, nor the complaint upon which it issued, charged any criminal offense, and hence such warrant is void, and the arrest of the plaintiff by virtue of it was illegal.

The complaint was made March 27, 1878, and charges that the plaintiff did, on May 20, 1877, in the town of Jefferson, in Green county, "commit the offense of fornication with Mary Jane Swartz, by her then and there carnally knowing," etc. The recitals in the warrant follow the complaint, except the offense is therein stated to have been committed May 20, 1878 — a date later than the issuing of the warrant. The objections to the validity of the warrant are that neither in it nor in the complaint is it alleged that Mary Jane Swartz was a single woman when the plaintiff thus carnally knew her, and the warrant states the alleged offense to have been committed at a future time.

As to the mistake of date in the warrant, it need only be said that it was purely clerical, and could mislead nobody. Certainly the plaintiff was not misled by it, and the process was amendable in that particular. Sec. 4706, R. S. (Laws

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of 1871, ch. 137, sec. 30). The omission from the complaint of an averment that Mary Jane Swartz was a single woman requires more consideration. The statute in force when the criminal prosecution was instituted provided that "if any man shall commit fornication with any single woman, each of them shall be punished," etc. 2 Tay. Stats. 1954, § 4 (R. S. sec. 4580). Hence it is an essential element in the crime charged that the female offender be unmarried.

It may be conceded that the complaint and warrant are insufficient, and that, had the objection been taken in the criminal proceeding, it should have been dismissed. Yet it by no means results therefrom that the arrest was illegal. A dismissal for the reason indicated would not necessarily be an adjudication that no crime was charged in the complaint and warrant, but only that a crime was not charged with technical legal accuracy. It must not be forgotten that the sufficiency of the complaint and warrant are not attacked in the criminal proceeding itself, but only collaterally, and when so attacked it has been held that great latitude of construction is to be indulged in support of jurisdiction. Thus in *Pratt v. Bogardus*, 49 Barb. 89, which was an action for false imprisonment, it was held that a warrant issued by a justice of the peace on a complaint for obtaining property by false pretenses was valid, although the complaint failed entirely to state what such pretenses were. The case is very similar in principle to the one we are considering. It was essential to a good complaint for obtaining property by false pretenses, to allege and state what such pretenses were, and a complaint not containing such statement is just as defective, and defective for the same reason, as one which charges fornication without alleging that the female offender is a single woman. So in *Payne v. Barnes*, 5 Barb. 465, which was also an action for false imprisonment, the complaint was for larceny, and the recital thereof in the warrant omitted to specify the value

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of the property stolen. The warrant was held valid, and the arrest under it legal. We are aware of no case in this court holding a different rule. On the contrary, we think our decisions tend to uphold the same doctrine. See *Cross v. State*, 55 Wis. 261, and cases cited by Mr. Justice TAYLOR. In the case of *State v. Gooch*, 7 Blackf. 468, which was an indictment for fornication, it was held, on a motion to quash the indictment, that it was a good indictment, although it contained no averment that the female offender was an unmarried woman. This is a very extreme case, and perhaps ought not to be followed in a direct proceeding. It is authority, however, that such a defect does not invalidate the warrant and render the arrest illegal. *Hintz v. State*, 58 Wis. 493, is an instructive case on this point.

Our conclusions on this branch of the case are that the complaint charges a crime; that the justice had jurisdiction to issue the warrant; that such warrant is valid, and hence that the plaintiff was lawfully arrested.

II. The denial by the court of the plaintiff's motion for judgment on the special verdict is assigned for error. This presents the question, Is the judgment for the defendant supported by such verdict? We understand the law to be well settled that, although an arrest may be for a just cause and under valid process, yet if it be for an illegal purpose, and the person arrested pays money for his release, he may be considered as having paid it by duress of imprisonment, and may recover it back. It was so held in *Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*, 8 N. H. 386; and in *Hackett v. King*, 6 Allen, 58. So in Bull. N. P. (7th ed.), 172, it is said: "If the arrest were by warrant from a justice of the peace on a charge of felony, . . . though a felony were committed, yet if the arrest be unlawfully made use of, it may be construed a duress."

We have already seen that the plaintiff was arrested

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under valid process, and the jury found that it was for just cause. But they found, also, that the defendant instituted the criminal proceedings for the purpose of compelling the plaintiff to make the settlement under which he paid the defendant the money he seeks to recover back in this action; and that the money was paid (or, what is the same thing, the note of the Musser Bros. was delivered) under an agreement between the parties that the defendant would not and should not prosecute the plaintiff for any criminal offense.

The purpose for which the prosecution was instituted was unlawful. It was not to vindicate the peace and dignity of the state in any way, or to promote the public welfare, but to coerce the plaintiff to pay a claim which he was unwilling to pay. This was an abuse of the process of the court. Then, in order to accomplish such unlawful purpose, he agreed not to prosecute the plaintiff for any crime. This also was unlawful. It is equally illegal to compound felony or a misdemeanor. *Severance v. Kimball*, *supra*, and cases there cited. See, also, *Fay v. Oatley*, 6 Wis. 42.

The purpose of the prosecution thus being unlawful, and the money having been paid pursuant to an unlawful agreement, if the plaintiff paid it for his release, it is duress of imprisonment, and he is entitled to recover his money. But there are findings which change entirely the aspect of the case. One of these is to the effect that the plaintiff did not make the payment to the defendant until after he was released from imprisonment and arrest. This is a most vital finding in the case, for it shows that the actual duress had ceased before the payment, and there was left for the determination of the jury only the question suggested in *Schultz v. Culbertson*, 46 Wis. 313, whether the original duress, or, more correctly speaking, the effect of it upon the plaintiff's mind, continued and influenced him to pay the money, although the actual imprisonment had ceased,

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or whether he paid it freely and voluntarily, uninfluenced by such former imprisonment. On that proposition the jury have found, in a variety of forms, that the payment was thus freely and voluntarily made.

Hence, while facts are found which show at one time duress of imprisonment, other findings show, in effect, that after such duress and the influence of it had ceased the plaintiff freely and voluntarily paid the money which he now sues to recover back. We think the special verdict supports the judgment for the defendant, and hence that it was not error to deny the plaintiff's motion for judgment.

III. The next question is, Ought the court, on plaintiff's motion, to have set aside the verdict and granted a new trial? If any finding of fact, essential to uphold a judgment for the defendant, is unsupported by the evidence, the motion should have been granted. Does the verdict contain any such unsupported finding? We are of the opinion that it does.

The defendant received the note of the Musser Bros. in full payment of the sum which the plaintiff agreed in the settlement to pay him. The transaction was precisely the same as though the plaintiff had made the payment in cash, without the intervention of the Mussers. But their intervention rendered it necessary that a mortgage to them should be executed by the plaintiff and wife. The latter was not present. It was also made necessary by the terms of the settlement that Mary Jane Swartz should sign a release with her father, the defendant. She also was absent when the settlement was made. Such being the situation of affairs the business was done in the following manner: The plaintiff executed to the Mussers his notes for the amount they were to advance for him to the defendant, and delivered the same directly to them. He then executed a mortgage on real estate and a chattel mortgage to the Mussers as security for the payment of such notes. The Mus-

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sers executed their notes to the defendant for the sum plaintiff had agreed to pay him. The defendant executed a release of damages, etc., to the plaintiff. All of these instruments, except the notes first above mentioned, were placed in the hands of Mr. Clawson, by consent of all interested, to be delivered to the persons respectively entitled thereto, after Mrs. Heckman should execute the real estate mortgage and Mary Jane the release, and they were afterwards so delivered.

When these instruments were placed in the hands of Mr. Clawson the plaintiff was in duress. The only foundation in the testimony for the finding that the note of the Mussers was delivered by the plaintiff to the defendant after the former was released from arrest and imprisonment, is that such note was delivered to him by Clawson after the plaintiff was so released. This finding (as already intimated) is equivalent to a finding that the actual duress had terminated before the plaintiff paid the defendant the money on the settlement. The finding is not warranted by any testimony in the case.

After the plaintiff had executed his notes and mortgages to the Mussers, and they had executed their note to the defendant and deposited it with Clawson, the agreement of the plaintiff made under duress was, so far as he was concerned, fully executed. After that time he was powerless to recede from his agreement, or prevent the delivery of Mussers' note to the defendant. He only stipulated that it should not be delivered until Mary Jane should sign the release, which she did the next morning. After she did so the Mussers' note remained with Clawson, awaiting Mrs. Heckman's signature to the mortgage, solely for the protection of the Mussers. The fact that the jury found the note of the Mussers was delivered to the defendant after the plaintiff was released, and with his consent, is therefore of no significance. An objection to such delivery at that time would

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have been unavailing. Because the plaintiff fully executed the agreement with defendant on his part while he was under arrest, reserving no right to recede therefrom, and thus putting it out of his power to prevent a delivery of Mussers' note to the defendant, he is in the same position as though he had paid over the stipulated sum in cash to the defendant before he was discharged from custody. Hence the finding in the special verdict to the effect that the imprisonment of the plaintiff had ceased before he made the payment cannot be upheld.

The materiality and importance of this finding has already been alluded to. It is a reasonable and proper presumption that the fact so found is the basis of the several findings that the plaintiff made the settlement and paid the money freely and voluntarily, uninfluenced by his arrest and imprisonment. At least, such may have been the basis of those findings. Eliminate from the case the alleged fact that the payment was made after the plaintiff had been released from custody, and it is doubtful whether the jury would, or probably could, have found that the settlement and payment were freely and voluntarily made by the plaintiff.

Other errors are assigned, but it is not deemed necessary to consider them.

Because a finding of fact material to the defendant's case, and which may be indispensable to his defense, is wholly unsupported by the evidence, the judgment in his favor cannot be upheld. The judgment must be reversed, and the cause remanded for a new trial.

By the Court.— It is so ordered.

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LARSON, Respondent, vs. SUPERIOR SHORT LINE RAILWAY COMPANY, Appellant.

September 8 — September 22, 1885.

RAILROADS: CONDEMNATION OF LAND. *(1) Joinder in notice of appeal. (2) Single appeal as to several parcels: Form.*

1. A single notice that several persons whose lands have been taken for a railroad, appeal, each severally and for himself, from the award of damages made to each of them by the commissioners of appraisal, is sufficient.
2. The owner of several lots or parcels of land taken for a railroad, and for which damages have been awarded separately, may take a single appeal from the whole award; and a notice stating generally that he appeals from the award is sufficient.

APPEAL from the Circuit Court for *Douglas* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

This is an appeal from an order of the circuit court refusing to dismiss the appeal in the action. The respondent undertook to appeal from the award of the commissioners appointed by the circuit court to fix the compensation and damages to be awarded the owners of the lands taken by said railway company for the construction of its railroad in the city of Superior and other places in Douglas county.

It appears from the records in this case that the commissioners were appointed on the petition of the railway company; that the respondent was named as one of the owners of lands proposed to be taken for the purposes of said company, and in regard to which the commissioners made their award; that before the respondent gave the notice of appeal below set forth, the award of said commissioners had been duly returned to and filed in the office of the clerk of the circuit court of said county, to wit, on the 29th day of May, 1884; that in said petition the said respondent was named as the owner of lots 1, 2, 3, 4, and 5, in block 91, in

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Superior city, and also as the owner of lots 1 and 2, and the south thirty-five feet of lot 3, in block 92, in said city; that said railway company sought to acquire a right of way twenty-six feet in width in Fifth street, in said city, adjacent and in front of said first-named lots; that said company also "sought to acquire a right of way in and to those parts of the last-named lots included between lines parallel with, one on each side of, and each distant fifteen feet from, the center line of the railway of said company, as the same is surveyed, located, and now constructed across said lots; and it further appears that separate awards were made to the said respondent, *Larson*, upon each of the eight lots above described, for the value of the part of each lot taken and the damage to the remainder of the lot by reason of such taking.

It also appears that John Peterson, Anthony Gallagher, and Charlotte Coburn had no interest in the lots so alleged to belong to said *Larson*, and that said parties were each the separate owners of other lots in said city of Superior, parts of which were sought to be taken by said railway company for the use of said company, and in regard to which separate awards were also made to said Peterson, Gallagher, and Coburn.

After the filing of the report of said commissioners with the clerk of said circuit court, and on the 27th day of June, 1884, the respondent, by his attorney Champ Green, filed in the office of the clerk of said court, a written notice, of which the following is a copy:

"*To the Superior Short Line Railway Company:* Take notice that *John P. Larson*, John G. Peterson, Anthony Gallagher, and Charlotte M. Coburn, severally and each for himself, appeals to the circuit court from the award of the commissioners fixing the amount of compensation to be paid each of them by said *Superior Short Line Railway Company* for land taken by said company to be used in the

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construction of a portion of its line of railway, and for damages to land adjoining the land so taken, and filed in the office of the clerk of said court on the 29th day of May, 1884.

[Signed] "JOHN P. LARSON,
"JOHN G. PETERSON,
"ANTHONY GALLAGHER,
"CHARLOTTE M. COBURN.

"By CHAMP GREEN, Attorney for each of said Appellants."

Upon filing said notice the clerk of said court entered upon his docket four suits, entitled substantially as follows: *John P. Larson v. Superior Short Line Railway Company; John G. Peterson v. Same; Anthony Gallagher v. Same; Charlotte M. Coburn v. Same.*

After such notice of appeal had been filed, and said actions entered upon the docket of said clerk, the company settled with Peterson for his damages, and had some negotiations with the respondent for the settlement of his claims, but no settlement was made, and afterwards, and on the 15th day of December, 1884, a motion was made by the railroad company to dismiss the respondent's appeal, which was denied, and the company appeals to this court.

C. L. Catlin, for the appellant.

For the respondent there was a brief by *S. F. White* and *Champ Green*, and oral argument by *Mr. White.*

TAYLOR, J. It is claimed by the learned counsel that the appeal should have been dismissed "(1) because it was an attempt to base four separate and distinct actions upon one process; (2) because the appeal is bad for duplicity, in that it attempts to take up four separate and distinct judgments by one appeal; (3) the appeal is bad for uncertainty, in that it fails to state the subject matter appealed from, and is misleading."

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The first and second objections relate to the joinder of the several separate owners of the lands and of the damages awarded therefor in the notice of appeal. It is, perhaps, a little out of the ordinary way of taking appeals in such cases to join separate owners as appellants in the same notice; but when the notice on its face shows that each party gives the notice separately and on his own behalf, and not in behalf of another, there does not appear to be any grave objection to such notice. Certainly each of the parties whose name is to the notice, gives the notice required by sec. 1849, R. S. It is a written notice of appeal, which the clerk of the court and the company can understand as well as though four separate notices had been made out and filed with the clerk.

It is not strictly correct to say that this notice of appeal is the commencement of an action in the circuit court by each appellant against the railway company. The statute does not say so, and it is not so in fact. The parties are already in court before any appeal is taken, by reason of the proceedings before had on the petition of the company. On filing the award of the commissioners, each separate award has the effect of a judgment in favor of the owner of the lands against the railway company; and if the company fails to pay the amount so awarded, the owner may have execution thereon against the company for the amount so awarded. See sec. 1850, R. S. 1878. The notice to be filed with the clerk is not a process to bring the parties into court, for they are already there. Its sole object is to advise the opposite party that the party giving the notice is not satisfied with the award of compensation and damages made by the commissioners, and desires to have a new award made by a jury and the court. When such notice is given, the statute says, "The appeal shall be considered an action pending in court," etc., not an action commenced in such

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court. The original petition filed by the railway company, asking for the appointment of commissioners to fix the compensation and damages which it shall be compelled to pay in order to take the desired lands, is the commencement of an action against all the owners of the lands desired by the company. In that action the company is the plaintiff, and all the owners the defendants (see sec. 1847, R. S.), and the award of the commissioners has the effect of a judgment against the company in favor of each separate owner. Sec. 1850, R. S.

The strict rule which applies to appeals from the judgments of one court to a higher or appellate court should not apply to a case of this kind, when the case is already in the court, and where a new trial is sought to be had in the same court. We think the notice was sufficient, and that the clerk of the circuit court was right in entering in his docket an action in favor of each of the appellants against the railway company.

There does not appear to be any great force in the other objection that the notice of appeal is not sufficiently certain, because the award shows that *Larson* was awarded damages for taking parts of separate and distinct parcels of land. We think it would be intolerable and unjust to require the owner of a dozen or more separate lots, parts of which are taken by the company, to bring a separate appeal for each lot, and if he could and should do so, it is very clear the court would direct but one trial for all the damages claimed. See *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 378. The notice of appeal in this case is sufficiently certain. It is an appeal from the award made to him by the commissioners for all the lands taken by the company which are described as owned by the plaintiff in such award, and, so far as the record is concerned, it does not appear that the respondent makes any claim for damages except as to those lots which are described as his in the

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petition, and for the taking of which he was awarded damages by the commissioners.

We think there was no error in refusing to dismiss the appeal of the respondent in this case.

By the Court.—The order of the circuit court is affirmed.

GATES, Respondent, vs. NORTHERN PACIFIC RAILROAD COMPANY, Appellant.

September 8—September 22, 1885.

(1) Assignment of cause of action: Parties. (2) Railroads: Navigable river: Drawbridge. (3) Damages.

1. A cause of action for the obstruction of a navigable river was assigned absolutely, in consideration of the assignee applying the net proceeds of the claim to the payment of certain debts of the assignors and paying any overplus to such assignors. *Held*, that the assignee might maintain the action in his own name.
2. When a railroad bridge with its draw closed is an unlawful obstruction of a navigable river, parties using the river are not bound to notify the railroad company to open the draw every time they wish to pass through; nor are they bound to open the draw themselves; nor are they bound to use only such vessels as can pass under the bridge when the draw is closed.
3. Where, by reason of the maintenance by defendant of an obstruction in a navigable stream, the plaintiffs were so delayed in their business of rafting logs in the season of high water that they were compelled to do a portion of such work at increased expense in the ensuing season of low water,—such seasons being of usual occurrence each year,—such increase in the expense of the work may be recovered as damages in an action for the obstruction.

APPEAL from the Circuit Court for *Douglas* County.

Action to recover damages on account of the obstruction of a navigable river by the defendant by failing and neglecting to open the draw in a bridge constructed by it over such river. The facts are stated in the opinion. There was a

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verdict for the plaintiff assessing his damages on account of the loss of time of the tugs and men employed by plaintiff's assignors, while delayed by the neglect or refusal of the defendant to open the bridge when the stream at that point was wanted for navigation by such assignors, at the sum of $343.13; and the additional damages on account of the delay, hindrance, and consequent loss in carrying on the business, at the sum of $1,500, being the extra cost of handling 10,000,000 feet of logs during the summer of 1883. From the judgment on the verdict for the sum of $1,843.13, the defendant appealed.

For the appellant the cause was submitted on briefs by *C. L. Catlin.*

For the respondent there were briefs by *S. Bacon* and *S. F. White,* and oral argument by *Mr. White.*

Orton, J. The plaintiff sued as assignee of the firm of Maxim, LeMay & Crane. The assignment was absolute, in consideration of applying the net proceeds of the claim in suit to the payment of certain claims against the said firm, and paying over the overplus to said firm.

The appellant company constructed a bridge on the line of its road over the Nemadji river, a short distance from its mouth, where it empties into Lake Superior, at Superior city, with a draw in it to admit the passage of boats and vessels and other craft navigating said river. The assignors were engaged during the years 1882 and 1883 in the business of receiving logs, which were run down said river at a point about two miles above said bridge, and there assorting them and joining them together in rafts and towing the same by means of tug-boats into the bay of Superior, and thence to the mills of their owners. While they were engaged in so sorting, booming, rafting, towing, and delivering logs during the fall of 1882, they were delayed by the neglect and refusal of the defendant company to open the draw of

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said bridge, or to allow the same to be opened, on the following times and occasions: On September 2d the tug John Pridgeon, in their employ, with a tow of logs, a period of four hours; on September 29th, twenty-four hours. During the spring of 1883, April 24th, the tug Nellie Catton, in the same manner, six hours, and on April 30th, two hours. On May 2d, the tug John Martin, fourteen and a half hours; and on May 5th, tug Minnie Le Mont, two hours. By these delays the assignors lost in the payment of the tugs a certain amount per hour, and in the payment of their employees so kept idle, a certain amount per hour. By these delays in the spring of 1883 the assignors were unable to retain and obtain tugs for their necessary work, and were compelled to go a long distance to obtain a tug with a joint in its smoke-pipe so as to be lowered and made to go under said bridge with the draw closed, and by such delays their work under certain contracts for delivering logs was so hindered and impeded during the spring freshets and high water in said river that they were compelled to do a large part thereof, which might otherwise have been done at such favorable season, later in the season, at a time of low water, which cost them twenty-three cents per thousand feet of logs more than it would have cost but for such delays during such high water, and they thereby suffered so much loss and damage. These are the main facts stated in the complaint.

We have carefully read the testimony, and we are satisfied that the verdict of the jury, both as to the amount of the plaintiff's damages and the cause thereof, was warranted by competent testimony, and it is useless to say more on the merits of the case or questions of fact.

A demurrer to the complaint was overruled, and this is assigned as error; but inasmuch as the same questions were raised on the trial, and in instructions to the jury, such error need not be specially considered.

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The special exceptions will be disposed of by the consideration of the questions of law involved.

1. Did the assignment to the plaintiff of the cause of action entitle him to sue alone? The assignment certainly entitles him to the moneys to be recovered in the action. It is correctly said by the learned counsel of the respondent, in their brief, that the reasoning in the case of *Hooper v. C. & N. W. R. Co.* 27 Wis. 81, would seem to confer such right on the plaintiff as assignee. In that case the shipper, or consignor, was allowed to sue alone for lost goods, for the reason that the consignee did not object, and without his objection it was presumed that it was with his knowledge and consent, and that the suit was prosecuted for his benefit by the consignor as his trustee. The case of *Smith v. C. & N. W. R. Co.* 23 Wis. 267, seems to be in point. The assignor of property and choses in action to pay debts brought the suit. DIXON, C. J., said in the opinion: "The interest of the plaintiff is residuary and equitable merely. He has no legal interest in the claim, the title being vested absolutely in the assignee, who alone can bring suit upon it and control the proceedings for its collection." In *Wooliscroft v. Norton*, 15 Wis. 198, an account was placed in the hands of another to collect the same, and pay the debt of the owner of the account to himself. It was held that such other person was the proper person to sue. See, also, *Allen v. Kennedy*, 49 Wis. 549; *Waterman v. C., M. & St. P. R. Co.* 61 Wis. 465; *McArthur v. G. B. & M. Canal Co.* 34 Wis. 139; *Vimont v. C. & N. W. R. Co.* 64 Iowa, 513. From these authorities, and others which might have been cited, and from principle, it is clear that the plaintiff had the right to sue.

2. Was it the duty of the assignors to have notified the company to open the draw of the bridge every time they wished to pass through with the tug-boats? If this bridge, with the draw closed, was an unlawful obstruction of the

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river, except when it was necessary to be used by the defendant company, then it was a nuisance, and the company created it and was responsible for it. In such cases no notice to remove or abate it was necessary. *Slight v. Gutzlaff*, 35 Wis. 675, and cases cited. When the draw was closed it was a complete obstruction to the navigation of the river by tug-boats as they are usually and generally constructed, and a nuisance *per se*, and there is no principle which could exonerate the company from removing or abating it without notice at any time when it was necessary or proper for the river to be so used. On this question the late cases of *Weisenberg v. Winneconne*, 56 Wis. 667, and *Barnes v. Racine*, 4 Wis. 454, are in point. The obstruction and delay would seem to be sufficient burden upon navigation without requiring a suffering party to delay and be damaged still more by the time required to give the offending party notice to abate the nuisance.

3. Ought the assignors to have opened the draw every time they wished to pass the bridge with a tug-boat? If any such duty was imposed upon them, it was by virtue of their right to abate the nuisance and not suffer unnecessary damage by the delays occasioned thereby by reason of its continuance. This principle would scarcely be a safe one in such a case where the company had the right to keep the draw closed when necessary for their use in running railway trains across the bridge. It follows, then, that if the assignors ought to have opened the draw at such times, as a temporary and necessary abatement of the nuisance as to them, it was their duty also to close it again after they had passed through, and thus become a party responsible to other persons navigating the river in a similar manner for the nuisance. This certainly the law cannot require. But, again, it would be exceedingly dangerous for all persons navigating that river to open the draw for themselves whenever they should wish to pass the

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bridge. A train of cars might rush upon the bridge without notice just when the draw should be so open. For those navigating the river to be charged with this fearful responsibility, and with notice as to just when the company may so run its trains across the bridge, and with the duty to notify approaching trains from either way to stop until the draw is closed, would be unlawful imposition. *White v. Chapin*, 102 Mass. 138. But it is useless to further discuss such a proposition against all reason and authority. *Weisenberg v. Winneconne, supra.* It was clearly a glaring omission of duty on the part of the company not to have had some one at the place to open the draw when so necessary. The general question of the right of a railway company or a municipal corporation to temporarily obstruct navigable rivers by bridges, and of the serviency of navigation to railway travel and transportation, has been too well settled since the *Wheeling Bridge Cases*, 9 How. 647, to be now opened. Railways may so obstruct and delay navigation to an extent reasonably necessary by bridges and other constructions, but no further. Tested by this invariable rule, the company, in the instance complained of, had no right to delay the tug-boats used by assignors longer than the bridge could have been opened by the company by due diligence.

4. If it was necessary that the assignors should procure tug-boats with adjustable smoke-pipes that could pass under the draw closed, in order to avoid unnecessary delay and damage, the evidence seems to be that they did so as soon as they could. But does the law in such a case impose the duty upon those navigating that river to resort to extraordinary and unusual methods of tug-boat construction in order to avoid delay and damage? We think not. The assignors had the right to use common and ordinary tugs in their business. They were not required to go a long distance and be at expense to find tugs which could be used on

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that river without opening the bridge. The company may as well claim that they need not have draws in their bridges over navigable waters, because boats and vessels might be so constructed as to pass under them. The company must adapt such constructions to the necessities of such boats and vessels as usually and commonly navigate such waters.

5. There is no contest over the first class of damage mentioned in the complaint, but as to the second class of damage the learned counsel of the appellant contends that such was too remote and speculative. The verdict of the jury divided these damages, and found—*first*, for that resulting at the time from delays at the bridge; and, *secondly*, that arising from the consequent loss to the assignors in carrying on their business, from such delays and hinderances. These last damages seem to have been computed as the additional cost to them of getting out their logs in a season of low water, made necessary by such delays in the season of high water. That such seasons of high and low water usually occur every year, or in most years, in respect to our rivers in this state and Minnesota, is of common knowledge. It is also common to adjust and regulate the lumber business upon such rivers by the reasonable expectation that such seasons will occur, and their occurrence may well be considered to be in the ordinary course of nature, and may be presumed to be considered, contemplated, and anticipated by contracting parties in relation to such use of the rivers, and are so common and usual as not to form an unexpected, uncertain, speculative, and independent cause intervening to break the connection and continuity between the delays in the season of high water as the cause, and the increased cost of the work in the season of low water as the consequence. The learned counsel of the appellant plausibly insists that the company shall not be held responsible for providential droughts, or such drought as occurred in the fall of the year 1883, which was the cause of the in-

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creased cost and damage to the assignors. That might be so if such low water was an unusual and extraordinary occurrence in that year, not to be anticipated or expected. If we applied the rule in cases of contract to this case, we might well say that at the time the company was causing these delays in the spring, it might have anticipated and expected that the assignors would be compelled thereby to carry on their business in the fall or season of low water at a greatly increased cost. It follows that, according to the rule laid down in *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, these damages are the natural, proximate, and direct consequence of these delays. See, also, *Cockburn v. Ashland Lumber Co.* 54 Wis. 619.

6. Intimately connected with this question is whether these damages are speculative, and cannot be certainly ascertained. Are they ideal, theoretical, or imaginary? If so, they cannot be recovered. If this suit had been brought after the first damages had been suffered, and before the last had occurred, and it had been sought to be proved what damages the assignors would probably suffer by increased cost of their work in the fall of that year, occasioned by such delays by reason of low water, such damages might be called speculative with better reason, for then such damage might or might not have occurred. It might have been an exceptional year of high water the whole year, and other circumstances might not have been present. But these natural occurrences all took place, and without the fault of the assignors they were compelled to suffer this increased cost of their work. What before might have been speculation had become fixed facts, which formed the *data* of certain estimation and computation of the exact loss. Similar damages have been allowed and sanctioned by this court, whatever may be the conflict of authority elsewhere, but we do not find much conflict on the question. In *Shepard v. Milwaukee G. L. Co.* 15 Wis. 318, the pecuniary loss, inconvenience, and annoyance experienced by the plaintiff

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in his mercantile business, by the defendant's refusal to furnish gas, were allowed as consequential damages. In *Jolly v. Single*, 16 Wis. 280, the defendant took wrongful possession of a mill rightfully in the possession of the plaintiff, and detached therefrom certain machinery, when the plaintiff had logs to saw in said mill, which he was thereby prevented from doing. The defendant asked the instruction that the plaintiff could only recover the cost of restoring the mill to running order, or the value of the property carried away. Mr. Justice PAINE said in his opinion: "Such a rule applied to such a case would be grossly unjust. A party is in possession of a mill, and has hired a large number of men to work it. He has on hand a large number of logs, which he is entitled to saw, and in sawing which he can earn a certain sum each day over and above all expenses." These were the elements of the damages found by the jury and approved by this court in *Kinney v. Crocker*, 18 Wis. 74. Evidence of the nature and extent of the plaintiff's business, and the loss resulting to him from inability to attend to it by reason of the injury, was decided to be proper, and the instruction that "if a man had an ordinary business yielding ordinary receipts he would be entitled to recover the diminution of those receipts resulting from his inability to attend to his business, occasioned by the injury," was approved. See, also, *Flick v. Wetherbee*, 20 Wis. 392; *Blair v. M. & P. du C. R. Co.* 20 Wis. 262; *Richardson v. Chynoweth*, 26 Wis. 656; *Ripon v. Bittel*, 30 Wis. 614; *Luck v. Ripon*, 52 Wis. 196; and *Bierbach v. Goodyear Rubber Co.* 54 Wis. 208.

Finally, we think the evidence shows that the assignors did all that the law required them to do to prevent the damages they suffered. The case was very ably presented on both sides. We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

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PIERCE, Appellant, vs. PIERCE, Respondent.

September 8 — September 22, 1885.

(1) Parent and child: Equity: Support. (2) Partition of estate: Estoppel.

1. The parents of an infant child lived apart, and the mother supported it both before and after lands were devised to it. Upon the death of the child the parents became its sole heirs. *Held*, that in equity the mother was entitled to an allowance out of the child's estate for the amount expended by her upon its support. TAYLOR, J., dissents.
2. In 1875 P. devised certain lands to an infant child, upon whose death in 1876 the lands descended to his parents. In May, 1883, on petition of the mother, partition of the estate of P. was made by the county court, and the lands devised to the infant child were divided between the parents as his sole heirs. In July, 1883, administration of the child's estate was granted to the mother, and she thereupon presented a claim against such estate for the support and maintenance of the child. *Held*, that the partition of the land was subordinate and subject to the payment of claims against the estate of the child, and did not estop the mother from asserting such claim.

APPEAL from the Circuit Court for *Rock* County.

The case is sufficiently stated in the opinion.

A. Hyatt Smith, for the appellant, argued that the father is bound to support mother and child. The mother may recover for maintenance when the child has property; not so the father. *Whipple v. Dow*, 2 Mass. 415; *Daws v. Howard*, 4 id. 97; 2 Kent's Comm. 191. Though after the father's death the mother is the head of the family, yet the courts show special favor to her, and if the child has property they will rather in any case charge the expense of its education upon the property than force her to contribute. Schouler, Dom. Rel. 239; *Haley v. Bannister*, 4 Madd. Ch. 275; *Hughes v. Hughes*, 1 Bro. C. C. 388; *Lanoy v. Duchess of Athol*, 2 Atk. 444; *Ex parte Petre*, 7 Ves. Jr. 403; *Mowbry v. Mowbry*, 64 Ill. 383. When the mother has main-

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tained her infant child without the order of the court, it is held that upon its decease she can claim for past maintenance. *Bruin v. Knott*, 9 Jur. 979. And in any case the widowed mother is entitled to a reasonable allowance out of her children's estate when her own means are limited. *Wilkes v. Rogers*, 6 Johns. 566; *Heyward v. Cuthbert*, 4 Desaus. 445; *Osborne v. Van Horn*, 2 Fla. 360; *Bradshaw v. Bradshaw*, 1 Russ. 528.

For the respondent there was a brief by *Sale & Pierce*, and oral argument by *Mr. Pierce*. They contended that it is the duty of the parents to maintain their children. Schouler, Dom. Rel. sec. 236; Reeve, Dom. Rel. 283; 1 Bl. Comm. 446; *McGoon v. Irvin*, 1 Pin. 526. A parent is without legal right of reimbursement for outlay for support of a child. *Darley v. Darley*, 3 Atk. 399; *Bradford v. Bodfish*, 39 Iowa, 683; *Dedham v. Natick*, 16 Mass. 140; *Duffy v. Duffy*, 2 Am. Law Reg. (N. S.) 434–5. The law raises no presumption of a contract on the part of a child to pay for support furnished by the mother. *Cummings v. Cummings*, 8 Watts, 366; *Hays v. Seward*, 24 Ind. 352; *Tyler v. Burrington*, 39 Wis. 376. The appellant is estopped from setting up a claim against the child's estate of which she and the respondent are the owners, for the reason that she was the petitioner in proceedings to partition his real estate, and the respondent being also a party the law implies a warranty and title from one to the other. 1 Washb. on R. P. 432; Bigelow on Estoppel, 346; *Van Orman v. Phelps*, 9 Barb. 500.

Orton, J. Prosper A. Pierce died, leaving a will, by which one third of all his property was devised to the appellant and her four children, share and share alike, and the respondent was executor. One of said children was Harvey Pierce, born in 1871, and died in 1876. The husband of the appellant, and father of said children, was George M.

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Pierce, who lived separate from his family, and the appellant boarded, cared for, supported, maintained, and clothed the said Harvey, with the other children, during his life, by her own exertions, and at her own cost and expense. The share of said Harvey, deceased, in said estate descended to his father and mother, as his only heirs, and was of the value of about $900. George M., the father, deeded his share thereof to one Blunt, and Blunt deeded the same to *Stephen C. Pierce*, the said respondent. The appellant became administrator of the estate of her son Harvey, deceased, and presented her claim for the care and maintenance of said Harvey to the county court, which was disallowed, and she appealed to the circuit court, and said order was affirmed, and her claim again disallowed, with full costs, in favor of the said *Stephen*, the contestant. These facts appear in the finding of the circuit court and history of the case.

The learned counsel of the respondent contends that the appellant, as the mother of Harvey, was bound as his natural guardian to support him gratuitously, and that she is estopped by the partition of the estate of Harvey between herself and said respondent, for which she was the petitioner; and these are the only questions in the case. The learned counsel of the appellant contends that in equity she is entitled to such allowance out of the estate of Harvey, as against her co-heir and husband, who utterly failed to support, or contribute to the support of, the child Harvey.

As to the claim that the appellant is estopped, and that *Stephen C.*, the respondent, is an innocent purchaser, and should be protected against said claim for an allowance, it is sufficient to say that the partition and the conveyances are subordinate and subject to the settlement of the estate of Harvey and the payment of claims against it; and further, as to the conveyance, it does not appear that the grantees paid value, and the said *Stephen C.* purchased with notice; and further, as to the partition, it is not inconsistent with

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the claim, and so far as it imports title in *Stephen C.*, such title is subordinate and subject to the payment of claims against the estate.

The authorities cited by the learned counsel of the respondent on the main question are none of them in point, and some of them are clearly in conflict with the weight of authority. In *Dedham v. Natick*, 16 Mass. 135, the question was of pauper settlement of the children after their pauper father had died and the mother had again married and moved to another town. The court said incidentally that in such a case the mother was the head of her family of such children, and had control of them, and bound to support them, if of sufficient ability, the same as their father would have been if living; and this is made the test of their legal settlement. Reeves, Dom. Rel., cited, has the following note: "As a general rule, as between the father and mother, the obligation to support the child rests principally upon the father." *Cummings v. Cummings*, 8 Watts, 366, was an action of *assumpsit* by the administrator of the estate of the mother for the support of her infant daughter. It was simply held that such support raised no such *assumpsit*. In *Hays v. Seward*, 24 Ind. 352, the father died after devising his estate to his widow for life, which consisted of a farm on which the family lived, and which she enjoyed and used. It was held that there was no implied *assumpsit* by her child to compensate her for its support in infancy. *Darley v. Darley*, 3 Atk. 399, was the case of a father seeking to apply the legacy left to his child to its support. No case cited on behalf of respondent approximates anywhere near this case in its facts and equities.

On the other hand, a widow who had supported her daughter during infancy, she having an estate of her own, maintained an action against the daughter after she became of age for such maintenance. *Whipple v. Dow*, 2 Mass. 415. In *Dawes v. Howard*, 4 Mass. 97, it was held that the

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father was bound to support his child, and yet an allowance was made to him out of the child's estate for such support, the father being in indigent circumstances; and it is said "the father was bound to support his child, but the mother was not." In 2 Kent's Comm. 192, it is said: "The father is bound to support his minor children if he be of ability, even though they have property of their own. But this obligation, in such a case, does not extend to the mother;" and many cases are cited to this text, some of which will be found hereinafter noticed. And the author says further: "And the rule as to the father has been relaxed. The courts now look with great liberality to the circumstances of each particular case, and to the respective estates of the father and children."

In Schouler, Dom. Rel. 239, it is said: "It is nevertheless clear that the courts show special favor to the mother, as they should; and if the child has property they will rather in any case charge the expenses of his education and maintenance upon such property than force her to contribute hers;" and many cases are cited. And it is said further: "A court of chancery will not readily make the support and education of infant children a charge upon the property of their widowed mother," etc.; citing many cases. *Haley v. Bannister*, 4 Madd. Ch. 275. In *Hughes v. Hughes*, 1 Brown, C. C. 388, an allowance for the maintenance of the children was made to the parents out of the children's estate. In *Lanoy v. Duke and Duchess of Athol*, 2 Atk. Ch. 444, the widow was allowed for the maintenance of her daughter out of her estate. In *Ex parte Petre*, 7 Ves. Jr. 403, a very large allowance was made to the mother for the support of her son out of his estate. In *Bruin v. Knott*, 9 Jur. Ct. Ch. 979, the widowed mother was allowed for the past maintenance of her son out of his estate after his death. In *Reeves v. Brymer*, 6 Ves. Jr. 425, the father was made an allowance for the past maintenance of his infant daughter

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out of her estate, and this was said to be the settled rule. And in *Sherwood v. Smith*, id. 454, the father was allowed both for the past and future maintenance of his children out of their estates. In *Watts v. Steele*, 19 Ala. 656, a similar allowance was made. In *Voessing v. Voessing*, 4 Redf. Surr. 360, the father died, and the mother became guardian and supported the infant daughter until she died. The mother was allowed out of her daughter's estate for her support from the time of the father's death. The authorities were quite fully examined, and the conclusion reached that there was no inflexible rule in such cases, but that each case must be determined on the facts peculiar to it. The rule in all cases is one of equity, and where it would seem equitable and just, an allowance out of the infant's estate will always be made, even for past support, especially to the mother when she is a widow and charged with the custody of her children in the place of the father.

I have cited more cases, and the principle involved in each, because this court would differ from the learned judge who decided this case at the circuit with great hesitation, and only after a full examination of the authorities on the question, when he had not the same facilities and time for a full examination of the question, aided by the elaborate briefs of counsel; for with such facilities and time he would be very likely to arrive at a proper legal conclusion in all cases. The fact that the mother for a considerable part of the time supported the child when it had no estate, and she could not have had any expectation of an allowance therefor, can make no difference in equity, as her right to any allowance in such a case does not depend upon contract, either express or implied, or an implied *assumpsit*.

The facts of this case appeal most strongly to a court of equity. The father was legally bound to support this child. He failed to do so, and, most unnaturally, imposed this burden upon his wife. Notwithstanding his shameful neglect

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of one of the first duties of a father he would shield his portion of the inheritance from his dead and long-neglected child from an equal contribution with the mother, who had borne the whole burden of his maintenance during his life, to her partial compensation. He ought to expect no favor from the court, for he deserves none. One half of the estate of his son must be treated as still his, subject to the payment of all just charges thereon in its administration. *Stephen C. Pierce*, the respondent, and who has most strangely secured title to a portion of the estate of which he had been the executor under the will of Prosper A. Pierce, deceased, is only the representative of this father in this most groundless controversy. Many cases cited arose when the child was still living to enjoy and require the estate, and yet in equity it was held chargeable with his support during his infancy, especially in favor of the mother. Here the child is dead, and his estate can only benefit his father and mother. Shall he enjoy the full benefit of it, while her portion has been more than consumed by discharging his duty to the child? It is impossible to conceive a case appealing stronger to a court of equity than this claim as a charge upon the estate of Harvey Pierce, deceased.

TAYLOR, J. I am unable to assent to the conclusion arrived at in the opinion of the court in this case. Had the opinion limited the right of the mother to charge the estate of her deceased child with its support from the time it acquired an estate until its death, I should not have felt called upon to dissent, although I should then have very grave doubts whether such charge should be made, under all the circumstances, against the child's estate after such a lapse of time and so long after its death. No case can be found, I think, in which a court of equity has ever charged the after-acquired estate of a child, and especially a mere infant, with the cost of its nurture from its birth until the

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time such estate was acquired, either in favor of the father or mother, under any circumstances. The law of nature, as well as the law of this state, charges the parent with the support of his or her infant child, when of sufficient ability, and if such ability does not exist, the state itself provides such support. If the mother can charge the after-acquired estate of her child for its previous support when such estate is the gift of its grandfather, why may she not charge such after-acquired property of the child which is the result of its own labor and exertions? And if the statute of limitations was not in the way, why might not the claim be urged at any time during the life-time and after the death of such child after coming of age? Certainly the fact that the child died during its minority cannot make the mother's claim more obligatory than if the death had occurred after its coming of age.

By the death of the child in this case, the mother inherited one half of its estate, which was some compensation for the nurture she had given it during the few years of its life, and should be some reason why a court of equity should not allow her claim against its estate for its support. I cannot see how the fact that the other half of the estate goes to the father of the child at its death can give the mother any other or greater claim on the estate for its support than she would have had in case the father had died before the child, and its estate had gone in some other direction. This is not an action at law or in equity between the mother of the child and her husband, its father, in which the mother claims of the husband and father compensation for the support of their child by her out of her separate estate, on the ground that it was his legal duty to support such child by his exertions and out of his estate, and therefore he should make her separate estate good for what she expended in its support. As I understand it, it is a claim made against the estate of the deceased child, and if she has no claim against

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that estate her action must fail, and it cannot be sustained on the ground that in equity the husband ought to reimburse her for the support of their infant child.

It is true, the husband is interested as co-heir of the estate with his wife to defeat her claim against the estate of the child; but that does not authorize her to set up any equities she may have against the husband to establish a claim against their child or its estate. The county court would have no jurisdiction of an action brought by the wife to charge her husband or his estate during his life-time with the money expended by her out of her separate estate for the support of their child, on the ground that the law cast the burden of such support upon him and his estate primarily, even it should be admitted that such an action could be maintained in the circuit or other court of competent jurisdiction; and yet that is what the wife seeks to do indirectly by filing her claim against the estate of her deceased child in the county court, and asking that court to allow such claim because she has an equitable claim for such support against her husband, who is still living, and over whose estate the county court has no control.

Upon the findings of the court the claim of the mother for the support of the child from the time of its birth to the time when it received its estate from its grandfather, exceeds the whole value of the estate so received by the child. Now, suppose the mother had, immediately on the death of the grandfather, applied to the court to have that estate applied to the satisfaction of her claim for support up to that date, would the court have been justified in so applying it? Clearly not. Had it appeared to the court that the father and mother were unable to give the child proper support, it might have applied the income of its estate, and, under proper circumstances, the principal thereof, to its future support. Certainly it would not have applied the estate to discharge the claim of the mother for

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past support, and leave its future support a charge upon the state, or upon the father and mother, who appeared to the court unable to support it.

The will of the grandfather shows that it was not intended by him that the estate given to the child should be appropriated by the mother for its past support, nor even for its future support, unless it should become necessary to so apply it on account of the inability of the father and mother to give the child a proper support during its minority. It is given to the mother in trust, to be held by her during the minority of the child, and as such trustee she could only use such part of the estate so granted as was necessary for its support after it became vested in her as trustee, and during such minority.

Again, there is nothing in the record that shows that *Anna E. Pierce*, the mother of said infant, had not, at the time she supported her child, and for which support she claims pay out of its estate, an abundance of means of her own out of which she could and did furnish support. The question of the ability of the parent to support his or her infant child is always an important consideration when an application is made to a court of equity to have the estate of the infant applied to such support during its infancy; and this is especially the case when it is sought to apply anything towards such support beyond the income of its estate.

It is urged in the opinion of the court that the husband should have supported the child, instead of the mother, and because he failed to furnish such support the mother should be allowed to charge the estate of the child with such support. To my mind that does not follow. If the husband had the ability to support the child, and neglected to give it such support, and the burden of its support was cast upon the mother unjustly, and she furnished it, that fact furnishes no reason for charging the child's estate with

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such support, although it might furnish a reason for charging the estate of the husband in favor of the wife for the money so expended by her. But, as suggested above, that is a controversy over which the county court has no jurisdiction. When the wife brings her action in a proper tribunal to charge the husband or his estate for such support, for aught that appears in this case he may be able to show that his wife's support of the child was, as between himself and her, a burden she ought to bear. At all events, there is nothing in this record which shows that it was inequitable as between the husband and wife—that at the time such support was given by the wife she was not justly chargeable therewith. She may have had an estate of her own separate from her husband; she may have separated herself from her husband without just cause, and taken her infant child with her; or there may be other reasons why, as between herself and her husband, she ought to have given the child its support. Of the circumstances under which the support was granted we know nothing, except that the mother nurtured her infant from its birth until its death, under six years old, as every mother would naturally do, and now seeks to charge the estate of the child, which came to it a little over a year before its death, with the cost of such support. As said above, no precedent can be found for the allowance of such a claim, and I cannot consent to help make such a precedent.

By the Court.—The order and judgment of the circuit court are reversed, and the cause is remanded with instructions to reverse the order of the county court and to order said county court to allow the claim as a charge upon the estate of Harvey Pierce, deceased.

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HANAWALT, Plaintiff in error, vs. THE STATE, Defendant in error.

September 8—September 22, 1885.

Bastardy: Likeness of child to defendant: Improper comments by counsel.

1. In bastardy proceedings the bastard child may not be exhibited to the jury for the purpose of showing by its likeness to the defendant that it is his child.
2. The trial court allowed the bastard child to be exhibited in evidence, but ruled that no comments should be made. Upon the argument counsel for the state commented upon certain resemblances between the child and the defendant to which attention had not been called when the child was present. *Held*, that such comments were improper, and, in the absence of any direction to the jury to disregard them, might be ground for the reversal of a judgment against the defendant.

ERROR to the Circuit Court for *Waupaca* County.

The facts sufficiently appear from the opinion.

G. W. Cate, for the plaintiff in error.

For the defendant in error the cause was submitted on the brief of the *Attorney General.*

TAYLOR, J. This was an action to charge the plaintiff in error with the support and maintenance of a bastard child. On the trial in the circuit court the state was permitted, against the objection of the plaintiff in error, to bring into court, and exhibit to the jurors for their inspection, as evidence in the case, the child of which he was charged with being the father; such child then being less than one year old. This is assigned as error in this court. The plaintiff also assigns as error that the counsel for the state was permitted to comment to the jury and draw their attention to the alleged similarity of the ears of the child to the ears of the plaintiff in error, as well as to the ears of the plaintiff's

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father, who was also in court and in the presence of the jury, the child, at the time, being absent.

Upon the question of the propriety of exhibiting the child to the jury as evidence in cases involving its paternity, the decisions of the courts are not in harmony. In North Carolina the supreme court of that state hold that such exhibitions may properly be made. See *State v. Woodruff*, 67 N. C. 89; *State v. Britt*, 78 N. C. 439; *Warlick v. White*, 76 N. C. 175; and *State v. Bowles*, 7 Jones, Law (N. C.), 579. The same was held by the supreme court of Iowa in *State v. Smith*, 54 Iowa, 104. In this last case the child was over two years old; but, in the case of *State v. Danforth*, 48 Iowa, 43, the same court held it was improper to exhibit to the jury a child only three months old. In *Eddy v. Gray*, 4 Allen, 435; *Jones v. Jones*, 45 Md. 144; *Keniston v. Rowe*, 16 Me. 38, the courts hold that testimony of witnesses that the child looks like or resembles in appearance the person charged to be the father is not admissible, and in *Reitz v. State*, 33 Ind. 187, and *Risk v. State*, 19 Ind. 152, it was held error to permit the prosecution to give the child in evidence, so that the jury might compare it with the defendant who was present in court.

In the *Douglas Case*, Lord MANSFIELD is reported as saying: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gestures, the smile, and various other things; whereas a family likeness runs generally through all these, for in everything there is a resemblance; as of features, size, attitude, and action." This language attributed to Lord MANS-

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FIELD is taken from Wills on Circumstantial Evidence, *94 (3d ed. 113; 5th Am. ed. 117). This author, on the next page, says that in a Scotch case, when the question was who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the tenants of the alleged father was held not to be relevant as being too much a matter of fancy and of opinion to form a material article of evidence. In the case of *Jones v. Jones*, 45 Md. 144, the learned judge who wrote the opinion refers to the language used by Lord MANSFIELD in the *Douglas Case*, and disapproves of it as authority, and thinks it has not been followed as a precedent in the English courts; and he quotes with approval the language of Justice HEATH in the case of *Day v. Day*, decided in 1797, in which the learned judge stated to the jury "that resemblance is frequently exceedingly fanciful, and he therefore cautioned the jury as to the manner of considering such evidence." The learned judge in the case of *Jones v. Jones*, *supra*, in disapproving of the language used by Lord MANSFIELD, says: "We all know that nothing is more notional in the great majority of cases. What is taken as a resemblance by one is not perceived by another with equal knowledge of the parties between whom the resemblance is supposed to exist."

It should be remembered that in the *Douglas Case*, and the Maryland case, the question of parentage was as to a person who was full grown. So that if there is anything certain in family likeness it would be fully developed, and if in any case such claimed likeness could be considered by a jury in determining the question of parentage, it would be in a case of that kind. In the case of *Jones v. Jones*, the court seemed to be of the opinion that, "when the parties are before the jury, and they can make the comparison for themselves, whatever resemblance is discovered may be a circumstance, in connection with others, to be considered."

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In any case this kind of evidence is inherently unsatisfactory, as it is a matter of general knowledge that different persons, with equal opportunities of observation, will arrive at different conclusions, even in the case of mature persons, when a family likeness will be fully developed if there be any. And when applied to the immature child its worthlessness as evidence to establish the fact of parentage is greatly enhanced, and is of too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury.

The learned author of "Beck's Medical Jurisprudence" says: "It has been suggested that the resemblance of a child to the supposed father might aid in deciding doubtful cases. This, however, is a very uncertain source of reliance. We daily observe the most striking differences in physical traits between parent and child, while individuals born in different parts of the globe have been mistaken for each other. And even as to malformations, although some remarkable resemblances in this respect have been noticed between father and child, yet we should act unwisely in relying too much on them. There is, however, a circumstance connected with this which, when present, should certainly defeat the presumption that the husband or paramour is the father of the child, and that is when the appearance of the child evidently proves that its father must have been of a different race from the husband or paramour, as when a mulatto is born of a white woman whose husband is also white, or of a black woman whose husband is a negro." In a case where the question of race is concerned, the child may be exhibited for the purpose of showing that it is or is not of the race of its alleged father. *Warlick v. White*, 76 N. C. 175. In a case like the one at bar, we think no exhibition should be made.

Justice Lyon, in the case of *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 370, says: "To allow jurors to make up their

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verdict on their individual knowledge of disputed facts material to the case, not testified to by them in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination and the benefits of all the tests of credibility which the law affords. Besides, the evidence of such knowledge or the grounds of such opinions cannot be preserved in a bill of exceptions or questioned on appeal. It would make each juror the absolute judge of the accuracy and value of his own knowledge or opinions, and compel the appellate court to affirm judgments on the facts, when all the evidence is before it and there is none whatever to support the judgment." This reasoning clearly shows the impropriety of permitting the jury to base their judgment, in whole or in part, upon their inspection of the child exhibited to them in court. If the child itself, when presented to the jury for inspection, is or may be evidence tending to prove its parentage, then this court upon appeal could not reverse their verdict, although the written bill of exceptions entirely fail to support such verdict, for the reason that this court would not have before it all the evidence in the case upon which the jury acted.

The learned attorney general says the bill of exceptions does not show that the child was exhibited to the jury as evidence in the case. In this he appears to be mistaken, as, in the part of the bill of exceptions which follows the reporter's notes of the evidence, it is clearly stated that "in course of the trial the plaintiff produced in court the child claimed to have been begotten by the defendant, and proposed to exhibit the same to the jury as evidence that it was the defendant's child. The defendant objected, and the court ruled that the child might be exhibited in evidence, but that no comments should be made." This statement, it will be seen, is made a part of the bill of exceptions.

The comments made by the counsel for the state to the

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jury in his argument, calling the attention of the jury to a peculiarity of the ears of the defendant and of his father, and his assertion that the child had the same peculiarity as to the ears, in the absence of the child, and without its appearing that the attention of the jury had been before called to such alleged peculiarity of the ears of the child, the defendant, or his father, were highly improper and were likely to prejudice the rights of the defendant. This impropriety on the part of the prosecuting attorney might, in itself, be sufficient ground for a reversal of the judgment, in the absence of any direction on the part of the presiding judge to the jury to disregard entirely the statements so made by the counsel, and a clear statement to the jury by such judge of the impropriety of such comments on the part of the counsel in his argument.

For the errors in permitting the child to be exhibited to the jury as evidence in the case tending to prove its paternity, and on account of the impropriety of the counsel for the prosecution in calling the attention of the jury to the alleged peculiarity of the child's, the defendant's, and his father's ears, as above set forth, the judgment of the circuit court must be reversed.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

THE STATE VS. PULLMAN'S PALACE CAR COMPANY and another.

April 7 — October 13, 1885.

Taxation: Sleeping cars: License fee: Statute construed: Local traffic: Inter-state commerce: Constitutional law.

Ch. 353, Laws of 1883, providing that owners of palace, drawing-room, and sleeping cars shall annually return to the railroad commissioner a "statement of the gross earnings made by the use of such cars

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between points within the state of Wisconsin," and shall pay a license fee of two per cent. of such earnings, requires a statement only of the earnings derived from the use of such cars in transporting passengers who both get on and off at points within the state. [Whether if construed otherwise the act would be constitutional, not determined.]

This is an application for an injunction to restrain the defendants from using palace, drawing-room, or sleeping cars within this state, on the ground that the defendant *Pullman's Palace Car Company* has not made the reports and refuses to pay the license fee required by ch. 353, Laws of 1883. The *Chicago, Milwaukee & St. Paul Railway Company* is made a defendant for the reason that it hauls the cars of the principal defendant upon its lines in this state. The application is based upon the complaint or information, the answer of the principal defendant thereto, the demurrer of the state to such answer, and the other papers in the case. The facts sufficiently appear from the opinion.

For the plaintiff there was a brief signed by the *Attorney General* and *H. W. Chynoweth*, Assistant Attorney General, and the cause was argued orally by *Mr. Chynoweth*. They contended (1) that ch. 353, Laws of 1883, requires payment to the state of two per cent. of all the earnings of the car company, made by the use of its cars within the state; and (2) that the law is a valid exercise of the taxing power of the state. No corporation, whether engaged in inter-state business or not, has any power or right to act beyond the limits of the state creating it, except by virtue of a comity between the states or of positive legislation by the state in which it wishes to act, giving it that privilege. The state of Wisconsin might exclude the Pullman company altogether, and may therefore prescribe the terms upon which it may do business within the state. *W. U. Tel. Co. v. Lieb*, 76 Ill. 172; *State v. B., C. & M. R. Co.* 25 Vt. 433; *Thompson v. Waters*, 25 Mich. 214; *Milnor v. N.*

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Y. & N. H. R. Co. 53 N. Y. 363; *Martin v. M. & O. R. Co.* 7 Bush (Ky.), 116; *W. U. Tel. Co. v. Mayer*, 28 Ohio St. 521; 1 Rorer on Railroads, 83; 1 Redf. on Railways, 294; *Stout v. S. C. & P. R. Co.* 3 McCrary, 1; *State Treasurer v. Auditor*, 46 Mich. 224; 2 Dillon on Mun. Corp. 745; *Att'y Gen. v. B. S. Mining Co.* 99 Mass. 148; Cooley's Con. Lim. 152; *Morse v. Home Ins. Co.* 30 Wis. 496; *Drake v. Doyle*, 40 Wis. 175; *Doyle v. Continental Ins. Co.* 94 U. S. 535; *Ducat v. Chicago*, 48 Ill. 172; *Firemen's B. Asso. v. Lounsbury*, 21 Ill. 511; *Fire Dep't of Milwaukee v. Helfenstein*, 16 Wis. 136; *People v. Imlay*, 20 Barb. 68; *Bank of Augusta v. Earle*, 13 Pet. 519, op. by TANEY, C. J.; *Cincinnati M. H. A. Co. v. Rosenthal*, 55 Ill. 85; *Fire Dep't v. Noble*, 3 E. D. Smith, 440; *Fire Dep't v. Wright*, id. 453; *De Groot v. Van Duzer*, 20 Wend. 390; *Comm. v. Milton*, 12 B. Mon. 212, 218; *Tatem v. Wright*, 23 N. J. 429; *Paul v. Virginia*, 8 Wall. 168; *Liverpool Ins. Co. v. Massachusetts*, 10 id. 566; *Ducat v. Chicago*, id. 410; *Pensacola Tel. Co. v. W. U. Tel. Co.* 96 U. S. 1. The very business in which the Pullman company is engaged is one which calls for the consent of the sovereign power of the state and involves the exercise of sovereignty. It pursues its business upon the railway highways of the state, which are obtained by the exercise of the power of eminent domain and can only be so obtained. The rules which apply to corporations would in this respect apply to individuals also. But apart from the question of incorporation or of the power of eminent domain, the statute in question is a valid enactment. The license fee provided for is not a tax upon the property of the company, real or personal, and is not a tax upon the money of the company. It is merely a license tax upon the franchise granted to the company, in consideration of the grant. A state is not obliged to concede to a foreign corporation higher privileges than it grants to its own; and it may exact from a foreign corporation the same tribute

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that is paid by its own. The gross earnings are resorted to merely as a means of ascertaining what the privilege granted is fairly and equitably worth. *Phila. Contributorship v. Comm.* 98 Pa. St. 48; *Ins. Co. of N. A. v. Comm.* 87 id. 173; *Walker v. Springfield*, 94 Ill. 364; *Att'y Gen. v. B. S. Mining Co.* 99 Mass. 152; *Comm. v. Lancaster S. Bank*, 123 id. 493, 495; *State Tax on Railway Gross Receipts*, 15 Wall. 296; *Kettanning Coal Co. v. Comm.* 79 Pa. St. 100; *State Railroad Tax Cases*, 92 U. S. 575; *Society for Savings v. Coite*, 6 Wall. 594; *State v. Stephens*, 4 Tex. 137; *Sacramento v. Crocker*, 16 Cal. 119; *State v. Coleman*, 4 id. 46; *State Treasurer v. A., T. & S. F. R. Co.* 19 Kan. 303; 1 Desty on Taxation, 218, 303 *et seq.;* Cooley's Con. Lim. 616; Hilliard on Taxation, 160, 161; Cooley on Taxation, 384; *Osborne v. Mobile*, 16 Wall. 479; *Erie R. Co. v. Pennsylvania*, 21 id. 492; *Delaware Railroad Tax Case*, 18 id. 206; *Cent. Pac. R. Co. v. State Board*, 60 Cal. 35; *Thomson v. Pac. R. Co.* 9 Wall. 587; *Railroad Co v. Peniston*, 18 id. 5; *Huntington v. C. P. R. Co.* 2 Sawy. 503; *W. U. Tel. Co. v. Richmond*, 26 Grat. 1; *Pullman S. C. Co. v. Gaines*, 3 Tenn. Ch. 587; *State v. Am. Exp. Co.* 7 Biss. 227; *Memphis & L. R. R. Co. v. Nolan*, 14 Fed. Rep. 532; *Am. U. Exp. Co. v. St. Joseph*, 66 Mo. 675; *Wolcatt v. People*, 17 Mich. 68; *Kitson v. Mayor*, 26 id. 325; *Fry v. State*, 63 Ind. 552; *Shepperd v. Co. Comm'rs*, 59 Ga. 535; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Tel. Co. v. Texas*, 105 U. S. 460; *State v. P., W. & B. R. Co.* 45 Md. 361; *Osborne v. Mayor*, 44 Ala. 493; *Southern Exp. Co. v. Mayor*, 49 id. 404; *A. T. & O. R. Co. v. Comm'rs*, 87 N. C. 129; Burroughs on Taxation, 150, sec. 79 *et seq.; Maryland v. B. & O. R. Co.* 34 Md. 344.[1]

[1] The Assistant Attorney General has also called the attention of the reporter to the following cases, published since the determination of the principal case: *Fargo v. Auditor General*, 24 N. W. Rep. (Mich.), 538; *Railroad Commission Cases*, 116 U. S. 307, especially *Stone v. I. C. R. Co.* p. 347; *Pickard v. Pullman S. C. Co.* 117 U. S.

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Alfred Ennis, attorney and counsel, and *D. S. Wegg*, of counsel, for the defendant *Pullman's Palace Car Company*, after arguing that the statute should be construed to apply only to earnings realized from passengers who both get on and off at stations within the state, urged further that if construed as contended on the part of the state, the act would be unconstitutional, under subd. 1, 3, sec. 8, art. I, Const. of U. S., as an unauthorized regulation of inter-state commerce. It cannot be sustained as a tax upon the business or occupation of the defendant. The taxing power of the state is limited to persons, property, and business within its jurisdiction. *State Tax on Foreign-held Bonds*, 15 Wall. 319; *Tappan v. Merchants' Nat. Bank*, 19 id. 490; *St. Louis v. Ferry Co.* 11 id. 430. As to the person, the domicile of the Pullman company, for every jurisdictional purpose, legislative or judicial, is Illinois, by which state it was incorporated, in which its franchises exist, where its offices and place of business are located, and of which state it is a citizen. As to the property of the company, it owns none in Wisconsin except sleeping cars, all of which except two run from without the state into or across it, stopping only for a short time at the railway stations. These cars have no *situs* in the state so as to subject them to taxation. *Hayes v. Pacific M. S. Co.* 17 How. 599; *Morgan v. Parham*, 16 Wall. 474. As to the business, that done where the passengers both get on and off at points wholly within the state is conceded to be subject to taxation; but the business done in furnishing accommodations for inter-state passengers is not transacted wholly within the territory of the state, and is therefore not a *business within its jurisdiction* so as to be taxable. Such business is an essential element of inter-state commerce, and no state has the right to destroy it; and the right to tax involves the right to destroy. Wisconsin is so situated that all the trade of the great, new, and as yet only partially developed Northwest territory passes

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over her soil. If she can prohibit the running of sleeping cars, engaged in this commerce, over her territory, why may she not at pleasure apply such a prohibition hereafter to every branch and department of inter-state commerce? In the case of *Nathan v. Louisiana*, 8 How. 73, the person taxed was a citizen of, and the *situs* of his business was in, Louisiana. In *Osborne v. Mobile*, 16 Wall. 479, the business taxed was located in Mobile. In *St. Louis v. Ferry Co.* 11 Wall. 423, and 107 U. S. 365, the domicile of the company and the *situs* of the property were regarded as essential elements in the question of jurisdiction to tax. See 107 U. S. 373–4. The *Granger* cases (*Munn v. Illinois*, 94 U. S. 113; *C., B. & Q. R. Co. v. Iowa*, id. 155; *Peik v. C. & N. W. R. Co.* id. 164) related to elevators and railroads situated entirely within a state, and the statutes sustained in no way interfered with inter-state commerce. *Hall v. De Cuir*, 95 U. S. 588. But a state law endeavoring to fix rates, even within its own jurisdiction, upon shipments which come into its territory from other states, go from it outside its borders, or pass through its limits, is void. *I. C. R. Co. v. Stone*, 20 Fed. Rep. 468; *Kaeiser v. I. C. R. Co.* 18 id. 151; *Louisville & N. R. Co. v. Railroad Comm.* 19 id. 679; *Carton & Co. v. I. C. R. Co.* 59 Iowa, 148. The reasoning in *Pullman S. C. Co. v. Gaines*, 3 Tenn. Ch. 587, is clearly fallacious. Mere temporary presence of the property of the company, while in transit, did not and could not confer upon Tennessee the power to levy a tax thereon. *Robinson v. Longley*, 1 Pac. Rep. 377. And that the Pullman company is neither a common carrier nor an innkeeper, as suggested in the Tennessee case, is expressly held in *Pullman Co. v. Smith*, 73 Ill. 360. See *Moran v. New Orleans*, 112 U. S. 69. It cannot be held that the statute is intended to impose a license upon local business only, and to measure the license by computing the percentage upon something else. *Cook v. Pennsylvania*, 97 U. S. 566; *Tele-*

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graph Co. v. Texas, 105 id. 460; *Welton v. Missouri*, 91 id. 275. When the business of running and using sleeping cars is not *local*, but for the accommodation of inter-state passengers, then such business does not require any license from the state, but can be regulated only by Congress. The state cannot, therefore, exact any fee for the privilege of doing such business. *Minot v. P., W. & B. R. Co.* 2 Abbott (U. S.), 324. If the tax be construed as one upon the earnings, rather than upon the business, of the company, then such earnings include those of an inter-state nature, and as to such earnings the company exercises no privileges conferred upon it by the state; and, having no domicile or *situs* in the state, its earnings of that nature are beyond the power of interference by the state. *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Delaware Railroad Tax*, 18 id. 206; *Railroad Co. v. Maryland*, 21 id. 457; *Indiana v. Pullman's P. C. Co.* 11 Biss. 561. Counsel also argued at length that the state had no greater right to exclude or impose restrictions upon foreign *corporations*, doing an inter-state business, than it had in reference to individual citizens of other states, citing and commenting upon the cases of *Morse v. Home Ins. Co.* 30 Wis. 496; 20 Wall. 445; *Hartford F. Ins. Co. v. Doyle*, 6 Biss. 461; 94 U. S. 535; *Bank of Augusta v. Earle*, 13 Pet. 519; *Nathan v. Louisiana*, 8 How. 73; *Runyan v. Coster*, 14 Pet. 122; *La Fayette Ins. Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 id. 410; *Railroad Co. v. Koontz*, 104 U. S. 5; *Pensacola Tel. Co. v. W. U. Tel. Co.* 96 id. 1.

The following opinions were filed June 1, 1885:

TAYLOR, J. This action was commenced by the state in this court against the defendants for the violation of ch. 353, Laws of 1883, by an alleged refusal on the part of the *Palace Car Company*, to pay two per cent. of the gross earnings of said company into the treasury of the state, as

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required by said chapter, in order to entitle said company to run its cars within this state, and its refusal to make a proper return of its earnings as required by said law, and this court is asked to enjoin said companies from running palace, drawing-room, or sleeping cars within this state.

The defendants claim, in their answer, that they have made return of their gross earnings as required by said chapter, and are entitled to have a license from the state to continue running their cars in the state.

The contention on the part of the defendants is that, under said law, the *Palace Car Company* is only required to return to the railroad commissioner a true statement of their gross earnings made by the use of their cars within the state, derived from their use in transporting passengers from point to point within the state, and not their earnings derived from transporting from points outside of the state to points within the state, or from points within the state to points outside of the state, or from a point outside of the state to another point outside of the state when the cars used in transporting from such last-mentioned points pass through the state or any part of it.

It is admitted by the learned attorney general that if the car company is only required by the statute to make return of its earnings derived from the transportation of persons from one point within the state to another point within the state, and not from passengers carried through the state, or from a point in the state to a point outside of the state, or from a point outside of the state to a point within the state, then the company has complied with the law, and the state has no cause of complaint.

On the part of the learned counsel for the defendants it is also contended that if the statute receives the construction contended for by the learned attorney general, then it is void, as being in contravention of the constitution of the United States, which provides that "Congress shall have the power

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to regulate commerce among the several states," and so the state would have no case against them.

After a careful consideration of the learned and able arguments submitted by the counsel for the respective parties upon the question of the construction of the statute in question, we have come to the conclusion that the construction put upon it by the defendants must be held to be its true construction, and that under its provisions the car company is only required to return the gross earnings it derives from the use of its cars in transporting passengers from one point to another, wholly within the state. The sections of the statute which are to be construed, are sections 2, 3, and 4, which read as follows:

"Sec. 2. Every such owner of the cars mentioned in section one, except railway companies as aforesaid, shall on or before the tenth day of February in each year, make and return to the railroad commissioner a true statement of the gross earnings made by the use of such cars *between points within the state of Wisconsin* during the preceding calendar year, which statement shall be verified by such owner, or by some officer or agent having official knowledge of the facts.

"Sec. 3. Every such owner shall, on returning the statement provided for by section two of this act, apply to the state treasurer for a license to use the said cars upon the railways operated in this state, and to charge or collect fare or compensation for the use thereof, and shall pay to the state treasurer for such license the fee provided in the next section, and upon such payment the state treasurer shall issue to such owner a license to use such cars and charge fare or compensation for such use as aforesaid.

"Sec. 4. The annual license fee to be paid by such owner, as aforesaid, shall be two per centum of the earnings reported, as required by section two hereof; the amount of such license fee to be computed by the railroad commissioner, and by him certified to the state treasurer."

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The first section, which attempts to prohibit the use of sleeping cars, etc., not owned by railway companies operating railways within this state, uses this language: "No owners . . . shall have a right to use, or charge or collect fare or compensation for the use of, any such car within the state," etc.[1] The part of this language which prohibits such company from making "a charge or collecting fare or compensation for the use of any such car within this state," can only be effective to prevent such charge to be made or fare collected within the state; as the legislature can have no power to make it unlawful to collect such fare or make such charge outside of the state, by a person or corporation not residing or being at the time within the state. The connecting of these prohibitions against collecting fare or compensation with the other prohibition as to use, would be some reason for holding that the use was prohibited only to the extent that the legislature prohibited the other acts, viz., to a use wholly within the state.

We do not, however, place any stress upon the language of the first section as limiting the scope of the statute to a use wholly within the state, but allude to it for the purpose of showing that the language of the first section is not inconsistent with the limitation which we think is clearly indicated in the second section, which requires the company or person owning the cars to make a return of the gross earnings made by the use of such cars, for the purpose of determining what sum shall be paid to the state for such right of use within the state. The section requires such owner to make "a true statement of the gross earnings

[1] Section 1 of the act, in full, is as follows: "No owners, whether corporate or otherwise, of palace cars, drawing-room cars, or sleeping cars, except railway companies operating railways within this state, shall have a right to use, or charge or collect fare or compensation for the use of, any such car within this state, until such owner shall have procured from the state treasurer a license to use such cars within this state as hereinafter provided."—REP.

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made by the use of such cars between points within the state of Wisconsin during," etc.

In giving construction to this act we must take into account the fact that the legislature, when it enacted this law, knew that the greater share of the gross earnings of the car companies, for the use of their cars in this state, was not derived from their use "between points within this state," but that the greater share of such gross earnings were received by the companies for their use either in crossing this state, or some portion thereof, to and from points in other states, and from points outside of the state to points within, or from points within to points outside of the state. If it was the intention of the legislature to require the companies to make a report of the proportion of the gross earnings of their cars for their use in crossing the state from a point in one state to a point in another state, or in coming from a point outside of the state to a point within, or from a point within to a point outside of the state, why did they limit the report of gross earnings by the use of such cars *between points within the state?* The words "between points within the state" are not apt words to describe the crossing of the state from an adjoining state on one side into an adjoining state on another side; nor does it aptly describe the act of going from a point within the state to a point outside thereof, nor from a point outside to a point within the state. The language here used is not the general language used in regard to the reports required to be made by railroad companies of their gross earnings for the like purpose of license, and which language has received a well-known practical construction.

The law in regard to the railroads requires the companies to make "a true statement of the gross earnings of their respective roads for the preceding calendar year." This language has received a construction, acquiesced in by both the state and the companies, that, in making their state-

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ment of gross earnings, it means, as regards passengers and freight carried across the state, or from points outside to points within the state, or *vice versa*, such proportion of such earnings as the carriage in the state bears to the whole carriage without and within. Had the language of the statute of 1883 been as general as that above quoted as to railroads, or had it declared that they should make a return of the gross earnings of their cars in the state, we would have felt constrained to give these general words the meaning which had been given to them as used in the law in regard to railroads. There certainly appears to have been an intent on the part of the legislature to limit the return of the gross earnings of the car companies, not to earnings for carriage in the state, but to such earnings as are derived from their carriage "between points within the state," and to no other earnings. If they had intended to include any other, why use the restrictive words?

It is said that it would be absurd that the legislature should have so restricted the gross earnings to be reported as a basis for fixing the license to be given to the companies, when they well knew that such gross earnings were but a mere fraction of their earnings in carrying passengers into, out of, and across the state, and that it is to be presumed it was these larger earnings that were intended to be reached. To this there are at least two sufficient answers: (1) The language used does not include such larger earnings except by giving it a most liberal construction in favor of the state, which, as we shall show, is not permissible in acts of this character; and (2) there is at least a very grave question as to the power of the legislature to impose a license upon persons or car companies upon the basis of their earnings in transporting passengers into, out of, and across the state, under the provisions of the constitution of the United States above quoted, in all cases where the persons or companies using such cars are not residents of the

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state and have no taxable property within the state. We must presume the doubtful character of such a law was known to the legislature, and that, as cautious and prudent legislators, they chose to place their action upon grounds which could not be questioned.

The learned counsel for the defendants cited the following authorities in support of the rule that laws which impose restrictions upon trade, or which lay a tax or excise, cannot receive a liberal construction in favor of the state. Dwar. St. 742; *Denn v. Diamond*, 4 Barn. & C. 244; *Tomkins v. Ashby*, 6 Barn. & C. 543; *Doe dem. Scruton v. Snaith*, 8 Bing. 152; *Gurr v. Scudds*, 11 Exch. 192; *Sewall v. Jones*, 9 Pick. 414; *U. S. v. Watts*, 1 Bond, 583; *Powers v. Barney*, 5 Blatchf. 203; *U. S. v. Wigglesworth*, 2 Story, 373.

A brief statement of what was decided in some of the cases above cited will show the strictness of construction which the courts have applied to laws of this kind.

In *U. S. v. Watts*, the court construed a statute which provided "that any person or persons having in charge or trust as administrator, executor, or trustee, of any legacies or distributive shares arising from personal property of any kind whatsoever, when the whole amount of such personal property as aforesaid shall exceed the sum of one thousand dollars in actual value, shall be subject to a tax or duty on such legacies or distributive shares," at certain specified rates. Watts, as executor of one Mrs. Hoard, deceased, had in his hands a large amount of money which he had received from the sale of real estate of the deceased, under a power of sale given to him by her will, and which, by the terms of said will, he was required to pay over to certain legatees mentioned in the will. The court held that the money in his hands derived from the sales of the real estate of the deceased, and which he was directed to pay over in cash to the legatees, was not subject to the tax or duty mentioned in the statute. The court, in deciding this case, say

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that they "cannot apply the equitable rule which is often applied in order to carry out the intent of a testator, and treat that as personal property which the testator directs to be sold and converted into personalty;" and they further say: "It is the duty of courts of the Union, undoubtedly, so far as they are invested with any agency in carrying out the financial purposes of the government, fairly to enforce the revenue laws of the country, and see that they are not fraudulently evaded. But they are not at liberty, by construction or legal fiction, to enlarge their scope to include subjects of taxation not within the terms of the law. It belongs exclusively to the legislative department of the government to define and declare upon what subjects taxes shall be imposed, and to provide the agencies by which they shall be assessed and collected; and, however expedient it may seem under certain circumstances to invade the proper domain of legislation by judicial construction, it is clearly in conflict with the theory of the government."

In *Powers v. Barney*, 5 Blatchf. 203, Justice NELSON, in construing a statute of the United States which in one section declared that "Bark Peruvian" should pay an *ad valorem* duty of ten per cent., and in another section of the same act said it should be exempted from all duty, says: "Another principle may also be invoked, which is that in cases of serious ambiguity in the language of the act, or doubtful classification of articles, the construction is to be in favor of the importer, as duties are never imposed upon the citizen upon vague or doubtful interpretations."

In *Tomkins v. Ashby*, 6 Barn. & C. 543, it was held that the following memorandum was not a receipt which required a stamp under the laws of England: "September 25, 1824. Mr. Tomkins has left in my hands £200. [Signed by Ashby.]" The statute imposed a stamp duty upon "every receipt or discharge given for or upon the payment of money," and there was a further declaration in the law that "any

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note or memorandum given to any person upon payment of money, whereby any sum of money, debt, or demand, or any part of any debt or demand, therein specified, and amounting to £2 and upward, shall be acknowledged to have been paid, settled, balanced, or otherwise discharged, shall be deemed a receipt." The court held that the act related wholly to receipts given in discharge of something formerly due, and not to the receipt of money to be held for another. In construing this act, Lord TENTERDEN, C. J., says: "Acts of parliament imposing duties are so to be construed as not to make any instruments liable to them, *unless manifestly* within the intention of the legislature."

In *U. S. v. Wigglesworth*, 2 Story, 373, the question was whether, under an act of Congress of 1841, a permanent duty had been charged upon indigo, or whether it had become an exempted article under the act of 1833, which had imposed a duty of fifteen per cent. *ad valorem* until June 30, 1842. The act of 1841, ch. 24, provided "that, upon all articles imported into the United States after the thirtieth of September, 1841, there should be laid, collected, and paid on all articles which are now free of duty, or which are chargeable with a duty of less than twenty per cent. *ad valorem*, a duty of twenty per cent. *ad valorem*, except on the following enumerated articles (among which indigo is enumerated), which shall pay respectively the same rates of duties imposed on them under existing laws." In giving construction to these laws, the court held that indigo became a free article of import after the 30th of June, 1842, notwithstanding the act of 1841; and Justice STORY gives the following reason for giving the law such construction: "My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations

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so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of the subjects or citizens; because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are, in no just sense, remedial laws, or laws founded on any permanent public policy, and therefore are not to be liberally construed. Hence, in the present case, if it be a matter of real doubt whether the intention of the act of 1841 was to levy a permanent duty on indigo, that doubt will absolve the importer from paying the duty beyond the period when it would otherwise be free."

In *Sewall v. Jones*, 9 Pick. 414, PARKER, C. J., in construing the state law which provided that "all real and personal estate which shall at any time be exposed for sale at public auction or vendue should be subject to pay certain duties," and holding that the act did not apply to a case where an auctioneer let real estate belonging to a bank, at public auction, to the person who would pay the highest annual rent for the term of five years, says: "If an existing lease were sold by auction, the tax might be due within the terms of the act, for in that case estate, real or personal, would be sold. But here there is nothing sold by auction, the estate not existing which it was the object of the sale to fix a price for. This may be thought a close construction of the statute, but we are to suppose that the legislature intended nothing beyond what their fair, legal construction will indicate. If the terms of these enactments have not embraced their object, the power is with them, by explanatory or additional acts, to extend them."

The rule of construction as laid down in the cases cited by the counsel for the defendants is not disputed by the attorney general. But it is argued that because the general language used in regard to railroads making report, as

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above quoted, has been construed by all parties interested to include all earnings made by the use of such roads in the state, the law in question should receive the same construction. The difficulty in giving it the same construction as has been given to the law in regard to railroad companies, lies in the fact that the language used in this law is not general, but restrictive; and to give it the same construction as is given to the act using only general words, would violate that rule for the construction of statutes which requires the courts to give effect if possible to every clause, sentence, or word used, and not to so construe it as to render such clause, sentence, or word superfluous or insignificant. *Harrington v. Smith*, 28 Wis. 43-67; *James v. DuBois*, 16 N. J. Law, 285, 293; *Hutchen v. Niblo*, 4 Blackf. 148; *Opinion of Justices*, 22 Pick. 571; *Opinions of Justices*, 7 Mass. 523; *Green v. Cheek*, 5 Ind. 105. To give the act the construction contended for by the attorney general, we must strike out altogether the words "between points within the state," or treat the same as of no significance and without meaning. This would be contrary to the rules of construction above stated. The very fact that words were inserted in the statute different from those used in the statute in regard to railroads, is a persuasive argument that the legislature intended the statute should have a different meaning. Unless the words added or changed are simply synonyms of those used in the existing statute upon a similar subject, it cannot be fairly claimed that the legislature intended the two statutes should have the same construction. We think, upon the face of the statute, the car company was only required to make the return it has done, and the state has nothing to complain of.

But, to our minds, there is another reason which is quite conclusive as to the intent of the legislature to restrict the return of gross earnings to such as the company received from the use of its cars in carrying passengers between

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points wholly within this state; and that reason is found in the history of the passage of the act itself. The legislative journals of the senate and assembly for 1883 show that two bills were introduced into the legislature relating to the subject of requiring the owners of sleeping, parlor, and drawing-room cars to obtain a license from the state, in order to be entitled lawfully to use the same in this state, except where such cars were owned by railroad companies operated in this state. The one was bill No. 65, senate, which, after undergoing radical amendments, was finally passed and became ch. 353, Laws of 1883; the other was assembly bill No. 89, which was indefinitely postponed. The assembly bill, upon the question of the returns to be made of the earnings, reads as follows: "The gross amount of all its receipts and earnings within or without this state for the calendar year next preceding the making of said report; and in computing such gross receipts and earnings the same shall be in the proportion that the distance traversed by the cars of such company in this state bears to the whole distance such cars are run. And at the time of making said report such company shall pay into the treasury of this state the sum of two dollars on every one hundred dollars of such receipts or earnings in this state, according to such computation." The original senate bill No. 65, when introduced into the senate, read as follows:

"Sec. 1. No railroad company whose line of railroad lies in part or is wholly within the state, shall transport or allow to be transported, over any of its lines of road, any palace cars, drawing-room cars, or sleeping cars not owned by such railroad company, until the owner or owners of such cars shall have procured a license from the state treasurer, as hereinafter provided.

"Sec. 2. The owner or owners of any such cars mentioned in section one of this act, other than a railroad company whose line of road lies in part or wholly within the state,

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desiring to have their cars transported over any of the lines of railroad within the state, shall, on or before the tenth day of February in each year, make and return to the railroad commissioner a true statement of *the gross earnings of such cars upon the railroads within this state* during the preceding calendar year, which statement shall be verified by the person having official knowledge of the facts."

[Section 3 has no bearing upon the construction of the present law.]

"Sec. 4. The annual license fee to be paid by the owners of such cars shall be four per centum of *the gross earnings of such cars within this state* during the preceding calendar year, as shown by the provisions of section two of this act; the amount of such license to be computed by the railroad commissioner, and by him certified to the state treasurer.

"Sec. 5. The owner or owners of the cars mentioned and described in this act shall make reports to the railroad commissioner according to section 1795 of the Revised Statutes, and such other reports as he may require, and all laws relating to railroads shall, as far as applicable, be taken to apply to the owner of such cars."

This original bill was referred to the railroad committee of the senate, and by way of amendment a bill in the language now found in ch. 353, Laws of 1883, was reported as a substitute for said bill 65, senate. The substitute was adopted and became a law.

The rejection of the assembly bill, which in express terms provided that the gross earnings of the car companies within the state should be computed in proportion to the distance traversed by the cars of the company in this state, to the whole distance traversed by such cars, and the amendment of the senate bill so as to confine such gross earnings to be reported, to earnings *made by the use of such cars between points within the state*, instead of such gross earnings in the state, clearly indicate an intent on the part of the legisla-

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ture to restrict the gross earnings to be reported as a basis for computing the license fee to such earnings, and such only, as were received by carrying passengers between points situate within the state. Had the legislature enacted the senate bill in the language used when it was introduced, there would have been good reason for holding that it should have received the practical construction given to the railroad law upon the same subject; but its amendment, by inserting the words "between points," renders it certain that the law should not receive the construction given to the railroad act on the same subject, and that the legislature did not mean that it should have such construction.

CASSODAY, J. I am compelled to disagree with my brethren as to the construction of ch. 353, Laws of 1883. By their construction, as I understand it, such "palace cars," etc., may be used by such owners (not excepted) within the state without paying any license fee whatever, provided only that such use is confined entirely to inter-state passengers. This seems to me to be in direct conflict with the first and sixth sections of the act, which are sweeping, and absolutely take away from such owners any and all "right to *use*, or charge or collect fare or compensation *for the use* of, *any* such cars *within* this state, until such owner shall have procured from the state treasurer a license *to use* such cars *within* this state;" and in case of any neglect or refusal to make the requisite report, or pay the requisite license, then "any such use by any such owner, in violation of the provisions of this act, may be restrained by injunction at the suit of the attorney general, in any court of competent jurisdiction."

To my mind, "a true statement of the gross earnings made by the *use of such cars* between points within the state of Wisconsin during the preceding calendar year," as required by section 2 of the act, covers and includes all such

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earnings made by such use between such points, and hence necessarily includes inter-state passengers, just as fully and completely as though it had said, all such earnings made by such use during such year within the state, between the lines of the state, and between all intermediate points within the state, or simply the gross earnings of the use of such cars within the state during such year. This construction has additional sanction from the fifth section, which declares that such "statement," or "the report required, . . . shall be in such form and shall embrace such details as shall be prescribed by the railroad commissioner." It seems to me that there is nothing in the language of the act, or its history, authorizing the exclusion from the requisite "statement" of *any* "of the gross earnings made by the use of such cars between points within the state" during such year, much less the exclusion of all or nearly all of them. "The annual license fee to be paid by such owner" is definitely fixed by the fourth section of the act. It "shall be two per centum of the earnings reported, as required by section two" of the act; and the "amount of such license fee" is "to be computed by the railroad commissioner, and by him certified to the state treasurer." The two per centum is to be upon the entire amount of such gross earnings made by such use within the state during such year. I find nothing in the act, nor its history, which to my mind limits, or which authorizes a construction which would limit, such per centum to a mere fraction of such gross earnings; much less, none at all, or a very small fraction thereof.

The conclusion reached by the majority of the court renders it unnecessary to consider the important question, whether the act is constitutional, and hence I unite with them in reserving that question for future consideration.

By the Court.—The application of the state for an injunction is denied.

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Upon a motion for a rehearing it was argued, *inter alia*, on behalf of the state, that the construction put upon the statute by the plaintiff is the only one which the words, interpreted in their ordinary sense, will bear. The language is explicit and, in fact, leaves no room for construction. *Love v. Hinckley*, 1 Abbott, Adm. 442; 13 Opinions of Attorney Generals, 513; *Doe v. Considine*, 6 Wall. 458; *U. S. v. Warner*, 4 McLean, 468; *Binns v. Lawrence*, 12 How. 17; *Denn v. Reid*, 10 Pet. 527. The object of the statute is revenue, and the legislature, knowing that the great part of the earnings of the company were derived from inter-state business, could not have intended to cover by the act only the small domestic earnings. As construed by the court the law brings into the treasury only the paltry sum of $240 a year — a sum not sufficient to pay for its passage and publication. As a tax law the statute should not be strictly construed. *M. & St. P. R. Co. v. Crawford Co.* 29 Wis. 116; *M. & St. P. R. Co. v. Milwaukee*, 34 id. 277; *Cornwell v. Todd*, 38 Conn. 443–7; *U. S. v. 3 Tons of Coal*, 6 Biss. 379; *U. S. v. Breed*, 1 Sumner, 159; *Taylor v. U. S.* 3 How. 197; *U. S. v. 100 Barrels of Spirits*, 2 Abb. C. C. 305–314; *Cliquot's Champagne*, 3 Wall. 114, 145; *U. S. v. 36 Barrels of High Wines*, 7 Blatchf. 459; *U. S. v. Mynderse*, id. 485; *U. S. v. 25 Cases of Cloth*, Crabbe, 356; *U. S. v. Olney*, 1 Abb. C. C. 275; *28 Cases, etc.*, 2 Benedict, 63; *U. S. v. Hodson*, 10 Wall. 395. Even in penal statutes the ordinary fair meaning of the words cannot be restricted. *The Schooner Harriet*, 1 Story, C. C. 256; *U. S. v. Wilson*, 1 Baldwin, 78; *Pike v. Jenkins*, 12 N. H. 255; *Huffman v. State*, 29 Ala. 40. There is nothing in the history of the act in question which militates against the construction contended for by the state. There being no ambiguity in the language, this is not a case in which reference can be had to the legislative journals. It may be doubtful, indeed, whether in any case the courts may look to the various

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stages in the passage of an act, to determine its construction. *U. S. v. U. P. R. Co.* 91 U. S. 72; *Dist. of Columbia v. Washington Market Co.* 3 MacArthur, 559, 571. A difference between the wording of this act and that of the general railroad act should not be taken to indicate a different intent. Sedgwick on Const. & Stat. Law, 197, and cases cited. See, also, as to the construction of the statute: *Water Comm'rs v. Brewster*, 42 N. J. Law, 125, 129; *Hyatt v. Taylor*, 42 N. Y. 258, 262; *Woolsey v. Cade*, 54 Ala. 378, 388; *The Abbotsford*, 98 U. S. 440; *Weston v. Shawano Co.* 44 Wis. 242; Cooley on Taxation, 54; *Jones Mfg. Co. v. Comm.* 69 Pa. St. 137.

Counsel also argued at length the constitutionality of the statute if construed as claimed by the state.

The motion was denied October 13, 1885.

EMERSON, Appellant, vs. DURAND, Executor, etc., and others, Respondents.

May 7 — October 13, 1885.

Partnership: Compensation of partner for services; Implied agreement.

A partner may claim compensation for his services in connection with the partnership business if an agreement to that effect is fairly implied from the course of dealing between the partners or from circumstances of equivalent force. Upon the evidence in this case it is *held* (ORTON, J., dissenting) that there was such an implied agreement.

APPEAL from the Circuit Court for *Racine* County.

Action for an accounting and settlement of a business carried on under the name of Emerson & Co., to which, it is alleged in the complaint, the defendant *Henry S. Durand*, as executor of the will of Caroline B. Durand, deceased, and trustee of her estate to hold and manage it for

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his daughters, the other defendants, had contributed the sum of $10,250. The defendant *Henry S. Durand* claims to have been, *individually*, an equal partner with the plaintiff in the business, and that his daughters, the other defendants, have no legal interest whatever in the proceeds or assets of the firm.

The business was carried on from about May 1, 1872, until August 28, 1882. It is alleged in the complaint that during that time neither of the defendants ever performed any service whatever in connection with the business, but left the entire labor in connection therewith to this plaintiff and persons employed by him; that the plaintiff's personal labor in and about said business has been reasonably worth the sum of $2,500 per year to the firm, over and above the value of his name and credit to the business; and that it was understood from the circumstances of the parties, etc., that the plaintiff was to be paid a reasonable compensation for his services. The answer of the defendant *Henry S. Durand* denies that there was ever any understanding that the plaintiff was to receive any other reward than his share of the profits of the business; and alleges that the pecuniary aid, advice, efforts, credit, and services of said defendant in the business have been of greater value than the labor and services performed by the plaintiff.

The view taken by this court of the evidence given on the trial will sufficiently appear from the opinion.

The circuit court found as facts, among other things, that about May 1, 1872, the plaintiff and the defendant *Henry S. Durand*, in his individual capacity, entered into a copartnership for the purpose of manufacturing linseed oil in the city of Racine, under the name and style of Emerson & Co., and it was then agreed that each of said parties should contribute $10,000 to the capital stock of the firm; that each of said parties did contribute the sum of $10,250; that the defendant *Henry S. Durand* from the formation of said

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firm until its dissolution aided in the conduct and management of the business thereof by his counsel and advice, and, whenever called upon by the plaintiff, performed sundry and divers services for the firm in Chicago and elsewhere; that the plaintiff during the continuance of the partnership gave his personal attention to the management of the details of the business and has engaged in no other pursuit, and that the books of the firm were kept under his supervision; that at some time during the continuance of the partnership the plaintiff advanced for the use of the firm the sum of $2,165.75 over and above the $10,250 paid in as aforesaid; that such advance was made without the knowledge of the defendant *Henry S. Durand*, and that his attention was not called to the fact until about January 1, 1882; that the firm was dissolved by mutual consent August 28, 1882; that there never was any agreement between the members of the firm that either of them was to have or receive any compensation or reward aside from an equal interest in the profits of the business; that the estate of Caroline B. Durand never had any financial interest in said firm business; that the defendants *Frances E. Durand*, *Alida L. Durand*, and *Helene S. Durand* were all minors when said partnership was formed, and that they never sustained the relation of partners to the plaintiff and have no legal interest in this controversy.

As conclusions of law the circuit court found, *inter alia*, that the parties were entitled to an accounting; that the plaintiff was not entitled to any allowance by way of salary or compensation of any kind, aside from the profits of the business; that the profits of the business must be equally divided between the plaintiff and the defendant *Henry S. Durand;* and that the plaintiff is entitled to interest at seven per cent. on any excess of funds put into the business by him over and above $10,250, for the length of time it actually remained in the business.

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An interlocutory decree was entered accordingly and the cause was referred to a referee to take and state the account in conformity to the findings and conclusions. The report of the referee was confirmed, and final judgment was entered accordingly. The plaintiff appeals.

For the appellant there were briefs by *Fish & Dodge*, and oral argument by *Mr. Fish.*

For the respondent there was a brief by *Quarles & Winslow*, attorneys, and *J. V. Quarles*, of counsel, and the cause was argued orally by *Mr. J. V. Quarles.* To the point that the plaintiff, having done just what he was expected to do when the partnership was formed, and no more, and having never found fault because he did it or asked for compensation until after the fact, is not entitled to any compensation for his services, they cited 2 Lindley on Part. 774, 775; 1 Collyer on Part. (6th ed.), 507, note; *Hutcheson v. Smith*, 5 Irish Eq. 123; *Caldwell v. Leiber*, 7 Paige, 493; *Lee v. Lashbrooke*, 8 Dana, 214; *Curliffe v. Dyerville Co.* 7 R. I. 325; *Piper v. Smith*, 1 Head, 93; *Murray v. Johnson*, id. 353; *Beatty v. Wray*, 19 Pa. St. 516; *Heath v. Waters*, 40 Mich. 465; *Robinson v. Anderson*, 20 Beav. 98.

The following opinion was filed June 24, 1885:

Cole, C. J. The facts of this case seem more consistent with the hypothesis that the plaintiff and defendant *Henry S. Durand* were partners *inter sese* in carrying on the business of manufacturing linseed oil at Racine than any other. The real relation of the parties has to be gathered by inference from their acts and the manner the business was conducted. There was no contract, either written or parol, clearly proven, to which reference can be had to ascertain their rights and liabilities. The plaintiff and *Mr. Durand* differ widely as to what was said and understood by them when they engaged in the enterprise, and there is no stronger reason for attaching credit to the statements of

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one than the other. As far as we can judge, they are of equal intelligence and credibility; and, where their statements are in conflict, they neutralize each other, except where sustained by other independent testimony. The plaintiff says that he did not understand he was entering into a general partnership with *Mr. Durand* to carry on this business, and he repudiates the idea that *Durand* was ever his partner. He states that he supposed *Mr. Durand*, as the result of their negotiations, was to contribute from the trust funds in his hands, belonging to his daughters, $10,000; that this sum was to receive its proportionate share of the profits earned by the capital stock employed in the business, after the expense in carrying it on had been deducted. But he did not understand that *Mr. Durand* expected to be, or was in fact, personally interested as a partner in the business. His idea of his relation to the parties, and the responsibility he assumed under the contract, may be gathered from the following extracts from his testimony:

He says: "I never considered there was an agreement to form a partnership with *Mr. Durand*. I didn't consider there was any partnership formed, unless the partnership was a special partnership with his daughters, as he told me. I didn't understand the amount put in to be a loan. *Mr. Durand* had some money that belonged to other parties. I understood him that it was not his. He told me it was not; that it belonged to his daughters; and that he would put it into the business. He put it in in the name of his children, in trust. My construction of our relation was that this money belonged to the children, and they held the relation to me of special partners. I had no idea of forming a partnership personally with *Mr. Durand*." Folios 155, 156. In another place he says: "The paper that I considered myself liable for, with the exception of the $20,000 in as capital, was $35,000 to *Durand* as trustee, and the rest

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at the bank. It all amounted to $95,000 at one time. I thought I was solely liable on the $35,000 loaned by *Durand*, trustee, except the capital of $10,250 put in. I thought the girls were liable to the amount put in, and nothing more. I considered them special or limited partners. I knew of no way to get anything out of them. I understood from the law that the estate was not liable beyond the amount invested. I know a partner is liable to the amount of his means; but when they were infants I don't suppose they were liable, because they could not give their consent." Folio 196.

These extracts show the plaintiff's understanding of the matter. But the difficulty about this arrangement is that *Mr. Durand's* daughters were minors, incapable of making a binding contract of partnership, whether general or limited. Besides, it does not appear that either of them ever attempted to make such a contract, or was ever consulted about engaging in this business. And now they deny in their answer any partnership, and disclaim any interest in the assets or profits of the concern. It may well be that the plaintiff assumed a peculiar responsibility in respect to the trust funds — if any there were — which were invested in the enterprise. Suppose the business had been unsuccessful and the entire capital lost, would not the plaintiff have been liable to the *cestuis que trust* for the amount of their funds put into it, even though he and *Mr. Durand* had actually been partners? We are inclined to think he would have been liable under the rule of law that where a trustee, in violation of his duty, invests trust funds in a business, the responsible party interested in that business, who knows the character of the funds, is liable to the *cestui que trust* for it. This unusual responsibility which plaintiff incurred in consequence of the investment of trust funds in the enterprise, with his knowledge, may be a circumstance to be taken into account when the question whether he should

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be allowed any compensation for his services in the management of the business is considered. It was doubtless a larger measure of liability than a partner ordinarily assumes in respect to the capital stock invested. But still we cannot see that that fact has any tendency to disprove the claim that a partnership was formed between the plaintiff and *Mr. Durand.* And *Mr. Durand* testifies that such a partnership was entered into, and his statements on this point are corroborated by many facts and the general course of dealing. We therefore feel warranted in assuming that these parties were partners in this business, and equally interested in the concern.

Such being the case, the important question arises whether, upon all the facts which are well established by the evidence, the plaintiff can be allowed any compensation for his services in managing the business. On this point it is not claimed that there was any express agreement that he should be paid for his services, but it is said under the peculiar circumstances the court will imply such an agreement. It is frankly admitted by the learned counsel for the plaintiff, that, as a general rule, one partner cannot charge the other partner for services rendered in the business of copartnership unless there is an express agreement to that effect, or where such an agreement may be implied from the course of business between the partners, or from the nature of the services performed being such as are not usual for one partner to render without receiving a compensation therefor. The authorities cited state the law substantially in that language. And the reason given for the rule is that "there is an implied obligation in every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern." Story, Partn. § 182. "Each partner, in taking care of the joint property, is, in fact, taking care of his own interest, and is performing his own duties and obliga-

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tions implied in, and constituting a part of, the consideration for the others to engage in the partnership; and the law never undertakes to measure and settle between the partners the relative value of their various and unequal services bestowed on the joint business." *Ibid.*

This is the ordinary statement of the rule of law upon this subject. But still the rule that each partner must be assumed to render his services in the partnership business gratuitously, is not inflexible or of universal application. It has its exceptions, founded in wisdom and experience. Where it can be fairly and justly implied from the course of dealing between the partners, or from circumstances of equivalent force, that one partner is to be compensated for his services, his claim will be sustained. This principle is fully recognized in the following cases: *Bradford v. Kimberly*, 3 Johns. Ch. 431; *Caldwell v. Leiber*, 7 Paige, 483; *Lewis v. Moffett*, 11 Ill. 392; *Levi v. Karrick*, 13 Iowa, 344; *Godfrey v. White*, 43 Mich. 171; *Cramer v. Bachmann*, 68 Mo. 310; and *Sheridan v. Healy*, 15 Chi. Leg. N. 104. So, where a partner fails to perform his agreement to render services to the firm, he may be charged on the settlement of the firm accounts with the value of the services which he agreed to give and refused to render. *Marsh's Appeal*, 69 Pa. St. 30.

This case differs in many important particulars from ordinary partnerships. The question is, Can an agreement to pay the plaintiff what his services were reasonably worth for the management of the business be fairly implied from the circumstances of the case and the acts of the parties? "The intention of the parties to any particular transaction may be gathered from their acts and deeds, in connection with surrounding circumstances, as well as from their words; and the law, therefore, implies, from the silent language of men's conduct and actions, contracts and promises as forcible and binding as those that are made by express words,

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or through the medium of written memorials not under seal." Add. Cont. 201; *Tyler v. Burrington*, 39 Wis. 376. In this case, as in many others, there may exist facts and circumstances so clear and unequivocal in their tendency as to be equivalent to direct and positive proof of an express contract to pay for services performed. We shall only allude to a few of the leading facts which tend in that direction. We have referred already to the fact that trust funds were invested in the enterprise,—for this is a legitimate inference from the evidence,—and that the plaintiff would doubtless have been liable to make good these funds to the *cestuis que trust* in case the capital had been lost. So, too, the *cestuis que trust* had the right as against both partners, on the facts disclosed, to claim their share of the profits arising from the use of their money in the partnership business. Besides, in our estimation, the evidence clearly and satisfactorily shows that the plaintiff had the entire control and management of the business, in all its branches and details, from the very inception of the adventure for about ten years. He gave his entire time and attention to it. He superintended the construction of the mill, purchased machinery for it, and superintended the making of the additions and improvements. It is true, he consulted *Mr. Durand* on these matters, and the latter made some suggestions as to the work, and occasionally visited the mill while it was being built and improved. But that the plaintiff had the entire charge and responsibility of the erection of the mill and improvements is a fact so clearly established as not to admit of doubt in our minds. The labor and care of operating the mill was performed and rested with the plaintiff and those employed by him. He hired the men and paid them; attended to the matter of procuring flaxseed and other stock; looked after the process of manufacturing it into oil, and to the selling of the manufactured products. He looked after the finances. Says Mr. Northrop,

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the cashier of the Manufacturers' National Bank, the institution with which the principal banking business was done: "The banking business of Emerson & Co. was transacted by *Thomas J. Emerson* and William T. Emerson in respect to deposits, drawing checks, and borrowing money, except so far as *Durand* gave his notes." The plaintiff thus had the charge of the business in all its branches and details, gave his entire time and labor to its management, while *Mr. Durand*, from the nature of his engagements, could not, and in fact did not, give scarcely a day or the least attention to it; for during all this period *Mr. Durand* was employed by the year by the Home Insurance Company, of New York, on a salary of $10,000, and, as he says, was "subject to call during all that time, as the exigencies of their service should require." He had an office in Chicago, where he spent the greater portion of his time attending to his insurance business. He came home usually Saturdays, when he sometimes saw the plaintiff and visited the mill. But the business of the mill was not to interfere with his engagement to the insurance company, and it is very plain it did not. His services and time were faithfully given to the company that employed him. He did not, either as an individual or as trustee, put as much capital into the concern as did the plaintiff. Nor did he, either as trustee or personally, raise as much money for working capital as did the plaintiff on his individual credit.

When these facts, and others of a like tendency, are considered, they afford, to our minds, sufficient ground for implying a contract to compensate the plaintiff for his services in the management of the business. It is unreasonable to suppose the parties intended or understood that the plaintiff would give his entire time, attention, skill, and ability to the promotion of the common enterprise, while *Mr. Durand*, working for an insurance company on a large salary, should really contribute neither time nor attention nor

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labor, and that both should stand upon the same ground as to profits, and the plaintiff be paid nothing for his services. But, without dwelling longer upon the evidence bearing upon this point, we conclude by saying that a contract to pay for services rendered may be as fairly and incontrovertibly established by the acts and conduct of the parties, in connection with surrounding circumstances, as by words. Such a contract, we think, may reasonably be implied in this case.

The learned counsel for the defendants, in his brief, indulges in some remarks as to the ability, sagacity, large business experience, and unlimited financial resources of *Mr. Durand*, which he claims were of great aid to this manufacturing enterprise. It is not necessary, nor would it be according to the truth, to deny that *Mr. Durand* is an able and sagacious business man,—one of experience, and of good credit in the mercantile world. The fact that he is employed by one of the leading insurance companies of the country on a salary of $10,000 is a sufficient guaranty of all this. But still, his skill, experience, and ability were not of that essential aid or advantage to the partnership business as counsel claims, because they were not devoted to promote the benefit of that concern. He was wholly employed about other matters in which his ability and skill were exercised. The evidence in this case is perfectly conclusive that the success of this profitable concern was not owing to *Mr. Durand's* efforts, credit, or energy, but it was largely, if not wholly, due to the prudent management, careful attention, excellent judgment, and untiring devotion of the plaintiff, who had charge of it. He was, as the proof shows, a gentleman of high character and excellent credit; or, in the language of one of the witnesses produced on the part of the defendants, "he was supposed to be a careful, prosperous man, who had been careful and gathered up money for years." It is impossible

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to deny that he possessed in an eminent degree the confidence of bankers and financial men. Judging from what appears in this record, he is every way the equal of *Mr. Durand* in financial resources and business capacity. To any and all disparaging remarks made as to his capacity as a financier, or his qualifications as a business man, the plaintiff need only point to the result of ten years' management of this manufacturing business for complete vindication. He commenced operating the mill some time in 1872, and had, as we have said, the exclusive charge of the business for ten years. During that period he made large gains, so that, after the payment of all debts and the capital originally contributed, there remains to each partner as net profits an amount nearly double the capital he invested. This money was made when — as it will be remembered by all — the country was suffering from one of the severest commercial crises it has ever passed through,— a period of several years when general distrust and loss of credit, corporate and individual, everywhere prevailed; when business enterprises of every kind and on every hand, owing to the depression in trade and financial embarrassments, were wrecked and ruined.

As the plaintiff and *Mr. Durand* were equal partners, the profits should be divided equally between them. The plaintiff contributed $2,165.75 more capital than *Mr. Durand.* We think this should be treated as a loan to the firm, not as capital stock. The plaintiff is entitled to receive this amount, with interest thereon, for the time the firm had the use of it. The plaintiff must also be credited with the value of his services in managing the business what they were reasonably worth. The court can ascertain such value by taking further testimony on the question if deemed necessary, and it is desired by the parties. The account can then be stated on a proper basis, and the assets divided as above indicated.

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By the Court.—The judgment of the circuit court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

ORTON, J. I am unable to coincide in the decision of this case in respect to the allowance of an annual compensation to *Thomas J. Emerson*, as the copartner of *Henry S. Durand* in the firm of Emerson & Co., for his personal services in the business of the concern.

That it is an invariable rule of partnership law that one partner cannot charge the concern for his personal services in the business, unless there was an express agreement between the partners to that effect, or unless the facts and circumstances were such that the law will imply such an agreement, is not disputed by any one. It is not a question of equity or *quantum meruit*, but solely of contract, either express or implied; nor is it a question of *comparative* services rendered by the several partners. Such a contract cannot be implied by balancing their services and by finding that one partner has rendered proportionally more service to the business or performed more labor than his copartners; for by such a rule such a contract might be implied in all cases, and the rule would be destroyed. There must be something peculiar in the nature or conditions of the business, or in the relative situation of the partners; something permanent and inherent, and not occasional or incidental, by which the law would imply that such was the understanding of all the partners. Any other rule or criterion would be too shifting and uncertain to be reliable.

There was never any express agreement on the subject. What, then, were the facts from which such an agreement is claimed to have been implied? The following facts are established by the testimony, mainly of *Emerson* himself: In 1872 *Emerson* was out of employment and desired to go into business, and consulted his old friend and neighbor,

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Durand, about going into the business of the manufacture of linseed oil, which he had learned was very profitable, and obtained his advice about it, and requested him to go into partnership with him in that business. Neither party had any personal experience in the business. *Durand* consented to go into the business with *Emerson* if he would take a personal supervision of it, as he was employed in other business and could not give it constant attention. *Durand* had control of a large amount of trust moneys, and it was agreed that an oil-mill should at once be built, and that each party should put in $10,000, which they did. This was in March, 1872. *Durand* was a man of great business experience, and of wide business acquaintance. The mill was built and the business started by the equal and joint contributions of each, and the real estate was held in the name of the firm, and the judgment of *Durand* was greatly relied upon in planning and laying the foundations of the business. Thus the plant was made. Afterwards the stock contributions were increased to $20,000 each. Thereafter *Emerson* had principal charge of the business, but from time to time frequently consulted and advised with *Durand* about it. According to the testimony of *Emerson*, *Durand* was very seldom consulted, and knew scarcely anything about the business, or the manner in which it was conducted, and yet he testified that *Durand* was a very careful and excellent business man. It would indeed be strange if such a man should invest in such an enterprise $20,000 of trust funds belonging to others, for which he was personally liable, and afterwards loan the concern more of such funds, and borrow for the concern other large amounts, and not concern himself about its conduct, and take scarcely any interest in it. *Durand* lived in Racine, and was a near neighbor and friend, besides being a partner, of *Emerson*, and was at home, idle, at least two days in the week, and it is most reasonable to suppose that he was often consulted

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about the business, and that much of its success depended upon his superior judgment and experience. On this question as to the amount of the beneficial services of *Durand* in the business from week to week and year to year during the whole time, the testimony of *Emerson* and *Durand* is widely apart; *Emerson* claiming that he rendered scarcely any service, and *Durand* claiming that his services were great and indispensable, and that when not at home attending personally to its concerns he made use of his wide acquaintance throughout the country, and his high standing and influence, in establishing the credit of the concern, and in securing the best markets for its products, and the best chances for purchasing seed and supplies. *Emerson* was an old man, and was not expected to do and did not do much manual labor, and only supervised the business and gave it his constant attention. Employees and clerks, to a very liberal number, rendered any manual labor of *Emerson* unnecessary in any part of the business. He had only to be accessible and give the necessary instructions. His son William, quite a young man, was employed at a salary of from $800 to $1,000 per year, and a younger son, Charles, physically disabled, was employed at about the same rate, without consulting *Durand* about it. In the course of the business, a large amount of money had to be borrowed, and *Durand* raised on his own paper from time to time $145,000, as admitted by *Emerson*, and claimed to be much more by *Durand*, and *Emerson* raised as much or more on his own paper, and *Durand* left in the concern all of his share of the profits.

There is, certainly, nothing in all this that would raise a contract by implication between them that *Emerson* should be paid for his services $2,500 per year, or any other sum. In all this, nothing is shown that is at all peculiar to this partnership except the great liberality and wonderful confidence of *Durand* towards and in his partner, *Emerson*, in

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the management and control of interests of such magnitude. But there is something more in the evidence in this case which makes this pretended claim of *Emerson* groundless, if not fraudulent, and that is, its *concealment* from *Durand* until about the final close of the business in 1881. There was a set of books kept, in which all the proper entries of the business were supposed to be made, and proper balances ought to have appeared. But two most important items seem to have been studiously and intentionally left out, and never appeared upon any of the books to which *Durand* had access. One was the salary of the boy, Charles, the son of *Emerson*, at $1,000 per year, which was left unpaid from year to year, and finally entered up near the close of the business at compound interest. When informed of this in 1881, for the first time, *Durand* of course objected to it, especially the interest, but does not contest it in this court. During all the time from 1872 until in the year 1881, nothing had ever been even intimated to *Durand* that *Emerson* intended to charge a salary for his own personal services, and no entry, charge, or memorandum thereof had ever appeared upon the books allowed to be seen by *Durand*. The business had been very profitable, and a large amount was to be divided between the parties, as finally ascertained upon closing up the business, and it is not unnatural that *Emerson*, through an avarice which increases with its gratification, should have desired to retain in his hands as large a proportion of such profits as possible, as the lion's share. For the first time, in 1881, when about to close up the business, *Emerson* informed *Durand* that he claimed an annual compensation of $2,500 for his services, and interest thereon compounded from year to year. As soon as so informed, *Durand* denied the claim, and insisted that he had no lawful right to any compensation whatever for his services.

In the first place, *Emerson* urgently requested *Durand* to become his partner; and probably for the reason that

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Durand had long been his friend and neighbor, and was a man of great business sagacity and experience, of high standing, and very wide acquaintance throughout the country. Why did not *Emerson* commence this business alone, or seek some other partner who could render more service in the business, and had better credit, and who was solvent? for he now testifies that *Durand* rendered scarcely any service, and could not do so on account of his other engagements, and had no credit or property. All this he knew as well when he sought him for a partner. He must have considered it an object and an advantage to the enterprise to have *Durand* connected with it; and to induce him to become his partner he stated that he wanted something to do, and that he would superintend the business, and it was on this understanding that *Durand* consented to embark in the enterprise on equal terms, and probably never dreamed that *Emerson* intended to charge the concern a salary; or at least nothing was said about it, and there was no such contract. *Emerson* had the full control of everything, and could employ all the labor or service the business required, and did employ his two sons at enormous salaries to assist him in the business nearly the whole time. Did *Emerson* intend at the start to charge the firm for his services, or did he then understand that he was to be paid for his services, or did he suppose that *Durand* so understood? It would seem that he did not. There are only two theories about it. He either did not so intend, understand, or suppose, and this claim at the close of the business was an *after-thought*, or he did at the start intend to make this charge and keep it concealed from *Durand* until the close of the business, and until it was too late for him to object to it, and then seek to sustain it in the manner he has.

On the first theory there is not even the pretext of any such claim, and on the second the claim is fraudulent. If he had paid himself or charged the concern with his first

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year's salary, on the books, or made an entry of it in some way, then *Durand* would have had a chance to interpose objection to it, or he could have expressly or tacitly assented to it. Why did he not make an entry of this charge on the books at the end of the first year, when his salary was due, as he now claims? Was it mere neglect, or did he fear that *Durand* would object to it, and leave the concern, or, if the law was not sufficient protection, insist upon a written agreement that *Emerson* should not be paid for his services, and have the matter then settled beyond question? But no! the matter was kept a profound secret from *Durand* for nearly ten years, and then, to his utter astonishment, the charge is sprung upon him in the final settlement. Is there anything fair or honest about this? Is there any evidence in such a transaction that there was an implied agreement on the part of *Durand* that *Emerson* should be so paid for his services? It would seem that a matter of so much consequence as $2,500 per year salary to one of the partners, and in the aggregate $25,000, and, if it was allowed to stand as an annual charge against the firm, with interest compounded, an amount which would consume nearly, if not quite, all of the profits coming to *Durand* from the business and the use of his capital, should have been made the subject of a special and express agreement at the time of the formation of the partnership, rather than be left to the uncertain chances of an agreement to be implied from the facts and circumstances about which the parties themselves so widely disagree in their testimony. This would make a very bold exception to the general rule of law, established in reason and justice, that one partner, to the exclusion of the other, should be allowed nothing for his personal services in the business.

If *Emerson* is entitled to such a salary, and he left it in the business as a debt of the firm to himself, why should he not have compound interest, if the claim is honest and just,

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as he insists that it is? *Emerson* so treated the salary of his son Charles, which was so left in the concern to his credit from year to year; why is he not equally entitled to interest on his salary? Both are rated as *salaries*, or annual compensation; and, if so, they are due and owing from year to year. Of course, this court does not sanction this matter of interest, and why not? The interest is just as valid a claim as the principal, on the theory of *Emerson*.

But if the question of *Emerson's* compensation for his services is not to be determined upon the principle of an implied contract,—and we have shown that there are no facts and circumstances from which any such contract could possibly be implied,—then it must have been determined upon a mere comparison of the services actually rendered by each partner for the benefit of the concern. According to the testimony of *Emerson*, his services were the most valuable; but according to the testimony of *Durand*, he rendered services which, although of a different kind, were at least equally valuable. This question cannot be determined in favor of *Emerson* without *discrediting* the testimony of *Durand;* and by what principle can this be done by this court in opposition to the finding of the circuit court. It would be a mere arbitrary opinion at best. The assertion of a principle which, if not unsupported by law, at least forms a most glaring exception to a general rule of law, ought to be supported by clear and unquestionable evidence. It is impossible, from the evidence in this case, for any court to determine that *Durand's* services were not as beneficial to the business of the concern as those of *Emerson*. A mere *notion* that one partner has done more than another, from a mere cursory view of their comparative services, which could as well be conceived in relation to all partnerships, will not answer. It would be difficult to find a partnership, doing any similar kind of business, in which the services of all the partners are equal in extent or value. A

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precedent should not be established which will encourage some partner in almost any firm, at the close of the business, to go into court for the purpose of establishing his claim for superior services rendered in the course of its business. I cannot but think that such a claim—in this case, of all others—has the least merit in law or equity. There was no contract to such effect, either express or implied, and there is no reliable evidence of any superiority of services.

I regret that this dissenting opinion is so long. But the case is very voluminous, was very ably contested, and is very important, both in the amount and principle involved.

Upon a motion for a rehearing, counsel for the respondent cited *Guyger's Appeal*, 62 Pa. St. 80; *Reybold v. Dodd*, 1 Harrington, 333; 26 Am. Dec. 401.

The motion was denied October 13, 1885.

THE STATE ex rel. ABBOT and another vs. MCFETRIDGE, State Treasurer.

May 8 — October 13, 1885.

TAXATION: RAILROADS: CONSTRUCTION OF STATUTES. *(1, 2) Statutes imposing taxes strictly construed. (3: 1) Railroad license fees: Gross earnings: Road operated but part of a year. (3: 2, 3) Change of company operating road. (3: 4) Spur tracks. (3: 5) Leased road. (3: 6) Earnings for car service.*

1. Statutes imposing license fees which are, to all intents and purposes, taxes, should be governed by the sames rules of construction as those imposing taxes *eo nomine*.
2. Such statutes should be construed with reasonable strictness against the government; and where the terms used are susceptible of two meanings, that should be preferred which imposes the lighter burden. CASSODAY, J., dissents.
3. Sec. 1211, R. S., provides that railroad companies and persons operating railroads in this state shall annually make and return a

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"statement of the gross earnings of their respective roads for the preceding calendar year, of the number of miles operated by each such company or person, and the gross earnings per mile per annum during such year." Sec. 1212 provides that the company or person "so operating any railroad shall, on returning such statement, apply for a license to operate" such railroad, and shall pay the license fee provided in sec. 1213. Sec. 1213 divides railroads into classes according to the gross earnings "per mile per annum of operated road," and fixes the license fee for each class. *Held:*

(1) In determining the class to which any railroad belongs, the number of miles operated and the gross earnings during the preceding calendar year only are to be considered, regardless of the length of time that the road was operated during that year. CASSODAY, J., dissents.

(2) The statement required is only of the earnings of railroads which the applicant is operating when the return is made, and for the privilege of operating which he is required to obtain license.

(3) When one company commences operating a road early in any given year, and the same was operated by another company during the preceding year, the earnings of the latter company thereon form the proper basis for computing the license fee to be paid by the company first mentioned.

(4) Spur tracks are to be included in the mileage of a railroad.

(5) The rental paid for a leased railroad is not to be deducted from the gross earnings upon which the license fee to be paid by the lessee is computed.

(6) The amount received by a company for the use of its cars, in excess of the amount paid out by it for the use of the cars of other companies, is a part of the gross earnings upon which the license fee is to be computed.

MANDAMUS.

Prior to 1879 the Wisconsin Central Railroad Company, a corporation of this state, issued certain bonds, and, as security therefor, executed its certain mortgage or trust deed to the relators as trustees for the holders of such bonds. The railroad company having failed to pay the interest due on the bonds, the relators, in January, 1879, pursuant to the trusts of said deed, and in due execution of the powers therein conferred upon them, took possession of the railroad of said company, and all other property covered by such

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trust deed, and have held the same and operated such railroad for the benefit of the bondholders from that time until the commencement of this proceeding. During some portion of that time they also, as such trustees, and in execution of the said trust, operated certain other leased lines of railway in this state.

On or about February 10, 1883, for the purpose of procuring a license to operate their railroads during that year, the relators presented to the state treasurer, the respondent, a statement of the gross earnings during 1882 of the railroads which they were operating, of the number of miles of road so operated by them, and the gross earnings per mile during such year, in attempted compliance with the requirements of sec. 1211, R. S. This statement placed the roads operated by the relators in the second class of sec. 1213, R. S., which fixes the license fee at five dollars per mile of operated road, and two per centum on the gross earnings in excess of $1,500 per mile. The relators thereupon paid such license fee to the respondent at the times specified in the statute, and demanded that he issue to them a license to operate their said roads during the current year, pursuant to sec. 1212, R. S. The treasurer refused to issue such license, alleging certain inaccuracies in and omissions from the said statement of the relators, which, when corrected, would show the gross earnings of the relators' roads for 1882 to be over $3,000 per mile, thus bringing those roads within the first class of sec. 1213.[1] The treasurer thereupon

[1] Secs. 1211-1213, R. S., are as follows:

"SECTION 1211. Every railroad company, and every person operating a railroad in this state, except railroads operated by horse-power, shall, on or before the tenth day of February in each year, make and return to the state treasurer, in such form and upon such blanks as shall be furnished by him, a true statement of the gross earnings of their respective roads for the preceding calendar year, of the number of miles of road operated by each such company or person, and the gross earnings per mile per annum during such year; which statement shall be

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demanded that the relators pay four per cent. of the gross earnings of their roads in 1882 as a condition precedent to the granting of such license. The relators refused to pay the required license fee, and thereupon, on a petition or relation showing the above facts, applied to this court for a writ of *mandamus* to the state treasurer requiring him to issue such license. An alternative writ was accordingly allowed and issued. The treasurer made due return thereto, and the relators have interposed a reply to such return. The case now comes before the court on the motion of the relators to order a jury trial of the issues of fact alleged to have been raised by the petition, return, and reply; and on

verified by the oath of the secretary and treasurer of such companies, or of the person so operating such railroad.

"SECTION 1212. Each such railroad company and each person so operating any railroad shall, on returning such statement, apply for a license to operate the railroad mentioned in such statement, and shall pay the license fee therefor provided in the next section; and thereupon shall receive from the state treasurer a license to operate such railroad for the calendar year commencing on the first day of January preceding, and terminating on the next succeeding thirty-first day of December, unless sooner revoked.

"SECTION 1213. The annual license fees for the operation of such railroads shall be as follows:

"1. Four per centum of the gross earnings of all railroads except those operated on pile and pontoon, or pontoon bridges, whose gross earnings equal or exceed three thousand dollars per mile per annum of operated railroad.

"2. Five dollars per mile of operated railroad of all railroads whose gross earnings exceed one thousand five hundred dollars per mile per annum, and are less than three thousand dollars per mile per annum of operated road, and in addition two per centum of their gross earnings in excess of fifteen hundred dollars per mile per annum.

"3. Five dollars per mile of operated road by all companies whose gross earnings are less than fifteen hundred dollars per mile per annum.

"4. Two per centum of the gross earnings of all railroads which are operated upon pile and pontoon, or pontoon bridges; which gross earnings shall be returned as to such parts thereof as are within the state.

"One half of such license fee shall be paid at the time the license so issues, and one half on or before the tenth day of August in each year."

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the motion of the respondent to dismiss the petition and alternative writ.

The following is a sufficient summary of the pleadings: It appears in the relators' petition for a writ of *mandamus* that their statement to the respondent of February, 1883, showed that the gross earnings in 1882 of the railroads operated by them was $1,030,900.11, and the total mileage of such roads was 440.42 miles. This is a fraction over $2,340 per mile per annum, and brings the roads of the relators within the second class of sec. 1213, R. S. Of the above earnings, $1,016,948.13 is stated to have been earned on the "Wisconsin Central Railroad and Packwaukee and Montello Branch," and $14,579.63 on the "Milwaukee and Lake Winnebago Railroad, and leased track from Schleisingerville to Milwaukee." It is stated in the relation or petition that the relators operated the Central Railroad and Montello Branch, above mentioned, during the year 1882; and the Milwaukee & Lake Winnebago Railroad, and the track of the Chicago, Milwaukee & St. Paul Railway from Schleisingerville to Milwaukee, from December 17, 1882, to the end of the year, under a lease; all of which roads they were operating when they applied for a license in February, 1883, as part of the Wisconsin Central Railroad. It is further stated therein that from January 1, 1882, until July 31 of that year, the relators operated the road of the Milwaukee & Northern Railroad Company under a contract with that company, which the relators terminated in the manner therein provided; that they have not operated such road since the date last aforesaid, and did not intend to operate it thereafter, and did not include the same in their statement to the respondent of February 10, 1883.

The return of the respondent to the alternative writ of *mandamus* controverts the statements of the relators contained in the petition, both as to gross earnings and mileage of the roads operated by the relators in 1882. The follow-

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ing table contains an abstract of the return in those particulars:

Name of Railroad.	Time Operated in 1882.		Distance in Miles.	Gross Earnings.
	From	To		
Wisconsin Central.....	Jan. 1..	Dec. 31..	319.92	$1,016,948 13
Packwaukee & Montello	Jan. 26..	Dec. 31..	7.10	
Milwaukee & Lake Winnebago	Dec. 17..	Dec. 31..	63.30	13,010 51
C., M. & St. P. (Schleisv. to Mil.).....	Dec. 17..	Dec. 31..	33.00	1,569 12
Milwaukee & Northern.	Jan. 1..	July 31..	124.40	333,458 19
C., M. & St. P.(Schwartzburg to Mil.).....	Jan. 1..	Aug. 31..	9.00	28,226 90
Car service (estimated)..	.....	....	.....	27,500 00

The respondent, in his return, claims that the item for car service should be included in the gross earnings of the relators. This is understood to be the amount received by them for the use of their cars on other railroads. He also claims that 15.47 miles of spur track operated with the relators' railroads should not be included in the total mileage of such railroads.

The reply of the relators to such return affirms the accuracy of their statement to the respondent of February 10, 1883, except that it states the total length of their roads to be five miles less than the actual length. It avers that the Milwaukee & Northern Railroad, so operated by them in 1882, is 140 miles in length, and that their gross earnings thereon while they operated it was but $218,099.73, exclusive of $14,153.33, paid as rental for the use of the track between Schwartzburg and Milwaukee, their use of which ceased with the surrender of their contract with the Milwaukee & Northern Company. The reply further alleges that the relators operate seventeen miles of spur track run-

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ning to mills, etc., and that the use of these adds materially to the earnings of their railroad; also, it states the course of business with other railroads, out of which the car-service fund arises. The remaining averments of the reply are chiefly cumulative to those contained in the petition.

S. U. Pinney and *A. L. Cary*, for the relators.

For the respondent there was a brief signed by the *Attorney General* and *H. W. Chynoweth*, Assistant Attorney General, and the cause was argued orally by *Mr. Chynoweth.*

The following opinion was filed June 24, 1885:

LYON, J. I. It must first be determined whether the roads operated by the relators in 1883, when they applied to the state treasurer (the respondent) for a license for that year, were within the first or second class of sec. 1213, R. S. The solution of this question depends upon the construction which shall be given to the two next preceding sections. It is maintained, on behalf of the respondent, that the earnings of the roads then operated by the relators, which they had operated but a small fraction of the year 1882, should not be taken as the total earnings of these roads for the whole year, but only as a rate or basis for computing what the earnings would have been had such roads been operated during the whole year, and had the earnings been at the same rate. That is to say, the contention of the respondent is that because the earnings on the Milwaukee & Lake Winnebago Railroad, and the track of the Chicago, Milwaukee & St. Paul Railway, extending from Neenah to Milwaukee, for the last fifteen days of 1882, far exceeded $3,000 per mile for that time, such must be taken to be the rate of earning on those roads during that year; and if, in aggregating the earnings of all the lines of railway operated by the relators, such rate would bring the aggregate earnings of all their roads above $3,000 per mile, then they are

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within the first class, and a license fee of four per centum on the gross earnings of all their roads should be exacted of them.

On the other hand, the relators maintain that the statute does not authorize any such mode of computation; that it only requires them to make return of actual gross earnings in the preceding year, which must be the basis for ascertaining the amount they must pay for a license to operate their roads for the then current year; and that the state treasurer has no concern with the manner in which, or length of time during which, the roads have been operated in such preceding year.

To determine which of these positions is the correct one, the same principles must be observed which would control were the Milwaukee & Lake Winnebago Railroad from Neenah to Schleisingerville, and the Chicago, Milwaukee & St. Paul Railway from the latter place to Milwaukee, the only roads operated by the relators. Whether or not the system of roads operated by them is within the first or second class of sec. 1213, is merely incidental to the question under consideration, and cannot affect its solution.

Laying out of view, therefore, the fact that the relators operated other railroads in 1882, we have a case like this: The relators apply to the state treasurer on February 10, 1883, for a license to operate their roads from Neenah to Milwaukee during the then current year,—which roads constitute a continuous line, 96 3-10 miles in length,—and make due return to such treasurer that their earnings on those roads in 1882 amounted to $14,579.63. They pay the license fee required by subd. 2, sec. 1213, R. S. The treasurer does not question the accuracy of the return, but says to the relators: "You operated these roads but fifteen days in 1882, and the earnings you return are *at the rate* of over $3,000 per mile per annum. Hence your roads are within the first class of sec. 1213, and you must pay a license fee of four

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per centum on such earnings for the privilege of operating them during 1883." Which of these conflicting positions is supported by the statute?

In the first place, it may be observed that the statute contains no express provision for a return of the time a road has been operated during the preceding year. It makes no mention of a user for a fraction of a year only. It requires a return of three facts—each a unit—to wit: (1) Gross earnings for the preceding calendar year of the roads operated by the applicant for a license; (2) number of miles of road so operated; and (3) "gross earnings per mile per annum during such year." But it was argued that the use of the term "per annum," in sec. 1211, fairly implies that the legislature intended that the earnings per mile during the preceding year should be ascertained by a computation, one factor of the problem being the length of time the road was operated during the preceding year. The statute requires applicants for license under it to return to the state treasurer "a true statement of the gross earnings of their respective roads for the preceding calendar year; of the number of miles of road operated by each such company or person; and the gross earnings per mile per annum during such year." It is correctly said that if the construction prevails for which the relators contend, the mileage earnings *per annum* are ascertained by simply dividing the total gross earnings by the number of miles of road operated, which is a problem in simple division that might readily have been worked out by the state treasurer without the aid of the applicant, and the argument is that unless the legislature supposed the problem more intricate it would not have required a solution thereof by such applicant.

It must be conceded that if the factor of time be introduced, the problem becomes more intricate. It thereby ceases to be a problem with but two known factors, from which a third is to be found, and becomes one with three

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given factors, from which a fourth is to be found. It is the difference between a problem in simple division, and one in the "Rule of Three." The necessity for requiring the applicant for a license to find the fourth factor in the latter case, while it is left to the state treasurer to find the third factor in the other case, is not very apparent. The argument does not cast much light on the legislative intent.

But it was argued that the words "per annum" in sec. 1211 imply a rate, and that, unless such be their meaning as employed in the statute, the words are mere surplusage,—performing no office whatever. The claim of the relators is that the words mean "during the year." If so, the use of both terms in the statute is a tautology, and one or the other might as well have been omitted. There is some force in the position that the use of the term *per annum* implies the idea of a rate, one of the factors in the ascertainment of which would be the length of time during the preceding year the roads had been operated. If such effect is not given to it, no other can be, except to hold that it means what is thereinafter expressed, to wit, "during the year." The term may mean "by the year," which seems to imply a rate or proportion. But it may also mean "in the year," which excludes the idea of rate, and requires the computation of earnings per mile to be made upon the two factors alone of mileage and gross earnings during the year. See Webst. Dict.

Had the legislature intended that the earnings of a railroad for a fraction of the preceding year should be resorted to for the purpose of ascertaining what the road would have earned had it been as profitably operated during the whole year, and that the amount of such hypothetical earnings for the whole year should determine in which class of sec. 1213 the road should be rated, it seems to us that some more specific provision on the subject would have been inserted.

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It is a reasonable inference that, had the legislature so intended, it would have provided that the applicant for a license should return the length of time the road had been operated during the preceding year, and the *rate* of such earnings per annum. Also, in the case of a road in process of being built, and which had been put in operation during the preceding year in sections at different times, provision would have been made for a return of the length of each section, the time it was put in operation, and the gross earnings of each. But the statute requires nothing of the kind, either expressly or by necessary implication, and furnishes no evidence of the intention claimed for it, except the doubtful and most unsatisfactory inference sought to be drawn from the use of what may reasonably be considered tautological phrases.

There is another consideration which is entitled to great weight in the construction of these statutes. They impose involuntary burdens for revenue purposes upon those who operate railroads. These impositions are called license fees, but in their objects and effects they are in the nature of taxes. Manifestly, the same rules which prevail in the construction of statutes imposing taxes *eo nomine*, should be applied to statutes imposing such license fees. It is quite elementary that such statutes must be construed with reasonable strictness against the government. If the state would impose pecuniary burdens upon its citizens, or a class of its citizens, it ought to be held to the obligation of defining the extent of such burdens with reasonable certainty. Failing to do so, resort should not be permitted to doubtful inference or strained construction to increase those burdens. If the terms used in the statute are susceptible of two meanings, that should be preferred which imposes the lighter burden. In the late case of *State v. Pullman's Palace Car Co. ante*, p. 89, the strict construction above suggested was

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given to a statute imposing a license fee. A full discussion of the subject will be found in the opinion of the court in that case by Mr. Justice TAYLOR.

A brief consideration of the history of legislation on this subject will serve to support and emphasize the views already indicated. By sec. 182, ch. 18, R. S. 1858, every railroad company operating a railroad was required to return to the state treasurer, in January of each year, "a true and just statement of the gross earnings of their respective roads for the preceding year, up to the first day of January." The next section imposed a tax equal to one per centum of such earnings, in lieu of all other taxes. By ch. 140, Laws of 1858, the time for making such statement was changed to February. In 1859 certain statutes involving the same principle were declared invalid by this court in *Knowlton v. Supervisors*, 9 Wis. 410, and in other cases, because they violated the provision of the constitution which ordains that "the rule of taxation shall be uniform." (Art. VIII, sec. 1.) Thereupon the legislature of 1860 enacted that all property of railroad companies, used in operating their respective roads, should be exempt from taxation. Ch. 173, Laws of 1860. The legislature then enacted ch. 174 [Laws of 1860], which required each railroad company to make the same return to the state treasurer of its gross earnings, and at the same times, as required by the former statutes. Each company was then required to pay to the state treasurer one per centum of such earnings as a license fee for the privilege of operating its road during the current year. Ch. 22, Laws of 1862, increased such license fee to three per centum of such gross earnings; and by chapter 315 of 1874 it was again increased to four per centum thereof. There was no further legislation on the subject until 1876.

During all the time the above statutes were in force, no idea of a rate of taxation based upon the earnings of a railroad for a fraction of a year is suggested. Whatever a

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railroad earned in one year, whether operated but a fraction of a year or the whole of it, whether its earnings were large or small in amount, was the basis upon which the license fee for the succeeding year was computed, and each company paid the same percentage of its gross earnings for its license.

Ch. 97, Laws of 1876, divides such railroads into three classes, on the basis of gross earnings per mile per annum, and imposes upon those who operate them a different rate of license on each class. This law properly discriminates in favor of the weaker roads by imposing the largest license fee upon those which earn $3,000 and upwards per mile per annum, and the smallest upon those which earn but $1,500 per mile, or less. This act merely makes such classification. It does not change the former laws in respect to the statements of earnings and mileage to be returned annually to the state treasurer. It contains nothing whatever from which it can justly be inferred that the legislature intended to require the return to show the length of time a road had been operated in the preceding year, which had been operated only a portion of such year. It contains no suggestion or hint of any change of the basis upon which license fees had theretofore been computed, and does not, either expressly or by reasonable implication, authorize the classification of any road upon the basis of hypothetical earnings. Secs. 1211–1213, R. S., are but a compilation of all the statutes above mentioned, and contain no additional rule on the subject.

On the argument of these motions, counsel for the relators filed with the court an unsigned printed discussion of some of the questions herein, which he stated was prepared by Mr. Turner, the former railroad commissioner. It is said therein that if a railroad be operated for only a fraction of a year, the "gross earnings per mile per annum" are to be ascertained "by spreading such earnings over the entire

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line operated, in the same ratio that they were realized during the time the road was operated." This seems to agree with the theory of the state. The learned assistant attorney general rests his argument of this point mainly upon that proposition, and insists that the relators should be held bound by it. This, we think, would be entirely unjustifiable. The question is one of grave public concern, and no such circumstance should be allowed to interfere with its determination on the merits.

For the reasons above suggested we are constrained to hold that under existing statutes the respondent had no concern with the length of time during which the relators operated the roads from Neenah to Milwaukee, but that the only factors upon which he could determine the class to which those roads belonged, were their length, and the earnings upon them in 1882. This takes them out of the first class of sec. 1213. Aggregating the earnings of those roads, on that basis, with the gross earnings of the other roads operated by the relators in 1882, it brings their whole system of roads within the second class of that section.

II. Certain other questions of minor importance are involved in the determination of these motions, and will now be briefly considered.

1. The first question is whether the earnings of the Milwaukee & Northern Railroad from January 1 to July 31, 1882, and the earnings of the relators on the track of the Chicago, Milwaukee & St. Paul Railway, from Schwartzburg to Milwaukee, from January 1 to August 31 of that year (during which periods the relators used those roads), should be included in the gross earnings upon which the relators' license fee for the year 1883 should be computed. We think this question should be answered in the negative. Sec. 1211, R. S., requires "every railroad company, and every person *operating* a railroad in this state," to make and return before February 10th, in each year, to

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the state treasurer, "a true statement of the gross earnings of their respective roads for the preceding calendar year." The next section requires the company or person *operating* any railroad, on returning such statement, to apply for a license to operate the railroad therein mentioned, and to pay the license fee required by sec. 1213. These statutes evidently contemplate that the return therein mentioned shall contain only a statement of the earnings of railroads which the applicant is *operating* when such return is made, and for the privilege of operating which he is required to obtain license. Hence we hold that the earnings of the above-named roads during the periods mentioned constitute no part of the gross earnings of the relators' roads upon which the license fee for 1883 is to be computed.

It should be observed in this connection that when one company commences operating a railroad early in any given year, and the same was operated by another company during the preceding year, the earnings of the latter company thereon is the proper basis upon which to compute the license fee to be paid by the company first mentioned. For example, if the Milwaukee & Northern Railroad Company operated its own road after August 1, 1882, and applied for a license to operate the same in 1883, the license fee to be paid by it should have been computed upon the gross earnings of the road during the whole of the year 1882, which, of course, includes the earnings of the relators thereon in that year.

2. From fifteen to seventeen miles of the relators' roads consist of spur tracks (so called), running from the main lines to sundry mills and manufactories away from such main lines, and are used to transport the products of those establishments to the main lines and to market, thus increasing the revenues of the road. We are clearly of the opinion that the length of these spur tracks should be included in the mileage of the relators' roads.

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3. The relators claim (as we understand their reply) that the rental paid by them for a leased road should be deducted from the gross earnings on such road, and the license fee computed on the balance. We think no such deduction should be made. One company issues its bonds, raises money upon them, and expends it in building a railroad which it thereafter operates; another company rents a railroad already built. One company pays interest upon its bonds; the other pays rent. If rents should be deducted from gross earnings, why not interest on such bonds? We perceive no difference in the two cases. The deduction of either rent or interest is opposed to the idea of gross earnings, which the statute makes the basis of the license fee.

4. The respondent claims that there should be included in the gross earnings of the relators the estimated sum of $27,500 for car service. This means moneys received by the relators for the use of their cars on the railroads of other companies. The reply admits the receipt of $23,100 beyond what the relators paid other companies for the same service.

The course of business renders it absolutely necessary that the cars of one railroad company should be run upon the tracks of many other railroad companies. Accounts are kept between the different companies, and balances adjusted for such service. Up to the point where the accounts between the various companies balance, the operation is a mere exchange of the use of cars, and is, in no correct sense, earnings. But the amount received by any company for the use of its cars, in excess of the amount paid out by it for the use of the cars of other companies, is one of its sources of revenue earned by its rolling stock. In other words it is a part of the gross earnings mentioned in the statute, and should be so treated.

5. The relators had only the right of trackage over the Chicago, Milwaukee & St. Paul Railway from Schleisingerville to Milwaukee, a distance of thirty-three miles. The

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question may arise whether the length of the road used under a mere right of trackage should be reckoned as a part of the mileage of the road. This question is unimportant in this case, and is not raised. The assistant attorney general concedes that this thirty-three miles may be included in such mileage. Hence the question is not determined.

We believe that the rules herein laid down cover all the material questions in this case. No doubt the relators and the proper authorities of the state can now readily agree upon the amount which the relators ought to pay as a license fee for 1883. We do not determine whether they have or have not already paid all that can legally be required of them. Neither do we determine whether there is any material issue of fact made by the pleadings. Both propositions are left open for the present, in the belief that the parties will adjust the whole matter without the further action of the court.[1]

By the Court.—Both motions are denied, without prejudice to the right of the respective parties to renew them, should the further exigencies of the case require it.

CASSODAY, J. Were it apparent, from secs. 1211, 1212, and 1213, R. S., that one of the purposes thereby sought to be secured was to enable every newly-constructed railroad to escape obtaining and paying for a first-class license until after such road had been operated one full calendar year,

[1] *Note by* LYON, J. Since filing the foregoing opinion, my attention has been called to the comments therein upon a clause quoted from the very able paper prepared by Mr. Turner and read in the argument, which, it was said, seemed to agree with the theory of the state. Upon a re-examination of that paper I am satisfied that Mr. Turner did not intend to assert the doctrine imputed to him in the opinion. He had already contended for the construction which the court has given the statute, and the clause quoted in the opinion was evidently inserted hypothetically for the purpose of meeting the case should the court reject the construction contended for.

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and, in addition thereto, such fractional portion of a year, if any, as might happen, then I might agree with my brethren in the construction they have given to those sections. But no such legislative intent seems to be therein disclosed. On the contrary, the general purpose seems to have been to raise revenue, by exacting from "every railroad company, and every person operating a railroad in this state" (except those operated by horse-power), a pecuniary consideration as a condition precedent to the exercise of a right otherwise perfect. *State ex rel. C., M. & St. P. R. Co. v. McFetridge*, 56 Wis. 260. Railroad property had already been especially exempted from ordinary taxation. Subd. 14, sec. 1038, R. S. The exaction of licenses is not to be construed as affecting such special exemption (sec. 1215); but is, nevertheless, in lieu of such taxation.

The sections relating to licenses only seem to contemplate railroads in existence and operation, leaving out such as are upon piles and pontoons; and sec. 1213 divided railroads into three classes, and the amount of the license exacted of each for the current year was therein graduated according to the value of its use as measured by its gross earnings in the preceding calendar year. The defect in the statute is the failure to fix any measurement of the value of such use of such newly-constructed railroad for the first calendar year, or the fraction of a year, it is so operated. But this defect does not indicate an affirmative intention to exempt from paying license, but only a failure to provide for enforcing its payment. This should not, and in my judgment does not, frustrate the graduated scheme of licenses for any subsequent year. To claim that it does, and that it was so intended, is to convict the legislature of the gross injustice of purposely imposing unequal burdens, and without uniformity. The mere fact that, under the sections cited, the value of such use for the current year is to be measured by the gross earnings in the previous year, does

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not authorize the court, in determining such value, to treat such earnings during only a small fraction of the year the same as though the road had been operated the entire year to secure the same amount of earnings. To do so, is to assume facts which are untrue, in order to escape the consequences of facts which are true. To my mind, it would be very absurd to hold that the use of 100 miles of newly-operated railroad, upon which the gross earnings in the previous year were $14,000 for only two weeks, was of no greater value and should pay no higher license than another hundred miles of newly-operated railroad, upon which the gross earnings were only $14,000 for the whole fifty-two weeks of such year. Certainly the value of the use of one of such roads by such measurement would be twenty-six times greater than the value of the other; and under the statutes the one, in my judgment, would fall within the first class and the other within the third; but, according to the construction indicated, both would fall in the third.

To make the absurdity suggested still more apparent, let us suppose that 100 miles of road was completed and commenced operation March 1, 1881, and from that time was operated continuously until December 1, 1882, being twenty-one consecutive months, and then stopped and remained idle until the close of the month and then resumed. Let us further suppose that the gross earnings for any consecutive twelve months of the twenty-one had been $300,000; or, in other words, "three thousand dollars per mile *per annum* of operated railroad." It must be conceded by all that this would have made it a first-class road if such earnings had all been secured in twelve months constituting a calendar year; and can it be that the same amount of earnings in the same length of time would make it a second-class road, merely because the twelve months in which they were earned was made up of fractional portions of two calendar years? In determining the amount of "the gross earnings

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per mile per annum," it is not perceivable why some particular twelve months has any special magic over any other twelve months in which such earnings are precisely the same; nor why just the twelve months constituting the calendar year has such magic over a less number of months, where the road is only operated during a portion of the year. To preclude the possibility of such an absurdity, as it seems to me, the legislature not only required "a true statement of the gross earnings . . . of the number of miles of road operated by each such company or person" for the preceding calendar year, "in such form and upon such blanks" as should be furnished by the state treasurer, but also such true statement of "the gross earnings *per mile per annum* during such year" (sec. 1211); and then, in order to determine to which of such three classes any such road belonged, it was made to depend entirely upon the amount of such gross earning "*per mile per annum.*" Subd. 1, 2, and 3, sec. 1213. To my mind a true statement in such form and upon such blanks, includes the length of time in such year that the road was operated in securing such earnings. The words "per mile per annum" thus used in one section, and five times repeated in the other section, have a meaning as well defined and as readily apprehended as "per centum per annum" in commercial law. And yet no one would dream of holding that five dollars as the gross earnings or interest for only fifteen days on a note of $1,000, were no greater *per centum per annum* than the same amount on the same note for 365 days.

I am unable to perceive how the words "per mile per annum" are equivalent to any other expression contained in either of the sections. Certainly not to the words "during such year," for they are both used in the same connection, thus: "the gross earnings per mile per annum during such year." Their repetition in sec. 1213 so many times, intensifies their significance in the minds of the legislature. It

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seems to me that no more apt words could have been chosen to express the rate of the gross earning per mile per annum than to have taken words similar to those which have been used for centuries to express the rate of interest per annum. I do not understand it to be the province of the court to eliminate from a statute words having a clearly-defined meaning and not equivalent to nor in conflict with any other expression in the same statute. Nor am I able to perceive why such words are to be rendered meaningless, even if "such statutes must be construed with reasonable strictness against the government." Nor do I consent to such rule of construction. It is said that they must be so construed because "they impose involuntary burdens for revenue purposes upon those who operate railroads;" that "these impositions are called license fees, but in their objects and effects they are in the nature of taxes," and are subject to the same rules as "statutes imposing taxes *eo nomine*." As indicated above, the whole of the railroad property was specially exempted from taxation. In lieu of taxes licenses are imposed. The rule seems to be inapplicable when invoked to support absolute exemption or unjust discrimination.

This question has been considered by this court in a case where taxes were levied and assessed upon certain lots belonging to the railroad company and occupied as a hotel. *Mil. & St. P. R. Co. v. Crawford Co.* 29 Wis. 116. The well-established rule was there invoked against the company on the ground that it was claiming the property to be exempt from taxation. In discussing the question, DIXON, C. J., said: "It is not easy to say this rule has any application in the present case; or, if it has, that it applies with much force." Page 123. He then went on to show that licenses were exacted in lieu of taxation, and added: "The payment of this sum into the state treasury, and which is called license money, must, in the light of past legisla-

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tion upon the subject, be regarded as, in the judgment of the legislature, an equivalent for the taxes which those companies would otherwise be required to pay, if assessed and taxed according to the ordinary methods prescribed by law. A strict construction of the statute, therefore, against the company, or a liberal one in favor of the public, can, with difficulty, be justified, in view of what seems to have been the legislative intent, and it would seem that little or no effect can be given to the rule. We are at liberty, therefore, and indeed required, to give the statute a fair and liberal construction in favor of the company, *or such an one as it should receive, supposing there is no injustice in the claim* made by the company, or *advantage* to be gained by it *over the public* or *tax-paying community generally*, in avoiding the taxation complained of." Pages 123, 124. Here the claim made is to give the relators an advantage over other railroad companies and the tax-paying community generally; and hence, according to the intimation of the learned chief justice, the stringent rule against the company, and in favor of the public, is applicable. That opinion was there sanctioned by two of the present members of this court, and I am not aware that it has ever been overruled. On the contrary, it was expressly sanctioned in *Mil. & St. P. R. Co. v. Milwaukee*, 34 Wis. 277. The stringent rule of construction maintained in the opinion of Mr. Justice TAYLOR in *State v. Pullman's Palace Car Co.*, from which I dissented, does not, as it seems to me, support the stringent rule of construction against the state here sanctioned, for the simple reason that Mr. Justice TAYLOR's opinion goes wholly upon the theory that Pullman's Palace Car Company had no property in the state which could be subjected to taxation. Such being the theory of that opinion, it is obvious that the doctrine of absolute exemption or discrimination in favor of that company, and against others, was not involved in that

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opinion, but is necessarily involved in the decision of this case.

For the reasons given I dissent from the opinion filed and the decision made.

Upon a motion for a rehearing briefs were filed by the *Attorney General* and *H. W. Chynoweth*, Assistant Attorney General, for the state, by *Geo. H. Noyes*, general solicitor of the Milwaukee & Northern Railroad Company, and by *S. U. Pinney*, for the relators.

The motion was denied October 13, 1885.

HAWES, Respondent, vs. CLEMENT and others, Appellants.

September 22 — October 13, 1885.

ATTACHMENT. *(1) Several actions: Validity of prior attachment, how tested: Practice. (2, 3) Affidavit: Amount of debt. (4) Absconding debtor: Affidavit.*

1. The property of B., which had been attached in several actions pending at the same time, was sold and the proceeds were in the hands of the sheriff. The actions were prosecuted to judgment and executions were issued. Several of the judgment creditors moved to vacate the attachment of H. which had been first levied upon the property. The motion was, in form, in the action of *H. v. B.* *Held*, that such procedure was effectual to obtain an adjudication of the questions of the validity of such attachment and the priority of the parties in their rights to the proceeds of the property.
2. An affidavit for an attachment must state the amount of the defendant's indebtedness to the plaintiff; and if the cause of action be of such a character that the plaintiff cannot know the amount, no attachment founded upon it can be lawfully executed.
3. An affidavit stating that the defendant is indebted to the plaintiff in an amount specified "as near as this plaintiff is able to determine," is insufficient.
4. Under subd. 1, sec. 2731, R. S., an affidavit stating that the defendant has absconded from this state, need not further state that he has so absconded to the injury of his creditors.

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APPEAL from the Circuit Court for *Rock* County.

The parties litigant are severally creditors of Boyd. Each of them commenced an action against Boyd on a separate demand, and sued out a writ of attachment therein. All of the attachments, seven in number, were levied upon the same property of Boyd. The respondent's attachment was first levied. On his petition the property so attached was sold pursuant to sec. 2740, R. S., and the proceeds of such sale remain in the hands of the sheriff. Each party has prosecuted his action to judgment and has issued execution thereon. The appellants, who are the plaintiffs in six of the attachment suits, moved the court to vacate the attachment of the respondent, *Hawes*, and to hold the same void as against them, and that the sheriff be directed to apply the proceeds of the sale of the attached property in satisfaction of their several judgments and executions. The respondent filed a counter-motion or petition, asking that such proceeds be first applied in satisfaction of his judgment and execution. The circuit court denied the motion of the appellants, and granted that of the respondent. This appeal is from the order in that behalf. The grounds upon which the validity of the respondent's attachment is denied are stated in the opinion.

For the appellant there was a brief by *Fethers, Jeffris & Smith*, and oral argument by *Mr. Jeffris*.

For the respondent there were briefs by *Carpenter & McGowan*, attorneys, and *Wm. Ruger*, of counsel, and oral argument by *Mr. Carpenter* and *Mr. Ruger*.

LYON, J. I. The moneys in the hands of the sheriff, being the proceeds of the sale of the attached property, are under the control of the court, and doubtless the court may inquire and determine who is entitled thereto, and order the same paid over to the person or persons so entitled. The procedure to that end, in form, is in the action of *Hawes v.*

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Boyd, yet, in substance and effect, it is not strictly in that, or in either of the actions against Boyd, but is rather in the nature of a special proceeding growing out of and founded upon all those actions; to which proceeding all the attaching creditors of Boyd (and perhaps Boyd also) are parties. If the respondent's attachment was valid, he is entitled to have his judgment paid first out of such moneys. If his attachment is not valid, the appellants, the other attaching creditors of Boyd, are first entitled to have the moneys applied in payment of their judgments in due order of priority. Manifestly the appellants may, in some proceeding, litigate and have determined the question of the validity or invalidity of such attachment. Regarding substance rather than mere form, we think they have adopted an effectual procedure to obtain an adjudication of that question. If authorities are required to a proposition so reasonable and just, they may be found cited in the notes to sec. 275, Drake on Attachment.

II. The validity of the respondent's attachment is impeached on two grounds. These are: (1) The respondent's claim was of such a nature that an attachment could not lawfully issue in an action to enforce it; and (2) the affidavit annexed to the writ is insufficient to authorize the officer to execute such a writ.

1. The cause of action stated by the respondent in his action against Boyd is to the effect that in March, 1884, he delivered to Boyd goods, wares, and merchandise of the value of $7,814.83 to be sold by the latter for him at Janesville; that he *(Hawes)* agreed to and did furnish Boyd a salesman at his own expense, and agreed to and did pay one half of the rent of store and one half the cost of advertising; that Boyd was to pay all the other expenses of making such sale, was to dispose of the stock to the best advantage, and, when sold, was to retain one half of the net profits accruing from the sale for his services therein, and was to

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make weekly deposits in a certain bank, to the credit of *Hawes*, of the money received from such sales. Between March 24 and July 14, 1884, Boyd so deposited $969.15, which is all *Hawes* ever received on account of such sales. Boyd continued to sell from the stock until December 5, 1884, on which day he absconded from this state.

The complaint concludes with the following averments: "This plaintiff further shows that he is unable to state what, if any, portion of said goods so delivered by this plaintiff to said defendant to be sold as aforesaid, remain unsold; and this plaintiff will be unable to state the exact amount till after he takes an inventory of the goods remaining unsold and belonging to this plaintiff; and this plaintiff further shows that the balance of said goods so delivered to said defendant and remaining unsold, or sold and unaccounted for, is the sum of $6,845.18, with interest from the said 14th day of July, 1884." Judgment is demanded for the sum last named.

It is essential to a valid execution of a writ of attachment that the affidavit annexed thereto should state not only a statutory cause for issuing the writ, but also the amount of the defendant's indebtedness to the plaintiff "as near as may be, over and above all legal setoffs." R. S. sec. 2731. The statement of the amount of such indebtedness is a most vital one. For the purposes of the execution of the writ it imports absolute verity, because it is not traversable in a proceeding by traverse to dissolve the attachment. R. S. sec. 2745. Such statement is the guide to the officer executing the writ as to the amount of property he ought to seize in order to secure the plaintiff. Hence it is required for the protection of the debtor, and of his other creditors as well.

Considering the importance of such statement, it necessarily and logically follows that if the cause of action be of such a character that it is impossible for the plaintiff or

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his agent to know the amount of such indebtedness, no attachment founded upon it can be lawfully executed.

Taking the most favorable view for the respondent, *Hawes*, of the transactions between himself and Boyd, and we have this state of facts: *Hawes* delivered his goods to Boyd, in trust that Boyd would sell them and pay over to him the proceeds of the sales, less one half the net profits. In stating the indebtedness, *Hawes* included nothing for profits. He merely claimed the value of the goods delivered to Boyd, less payments. We may therefore exclude from consideration any question of the amount of profits. But in order to ascertain the amount of Boyd's indebtedness to *Hawes* at any given time, it was necessary to know what amount Boyd had realized for such of the goods as he had theretofore sold. It was not sufficient to know merely what goods he had sold, for the value thereof is not the measure of his indebtedness. It is the amount realized which, under the contract mentioned in the complaint, measures the liability of Boyd. Hence, before *Hawes*, or any one for him, could state the amount of Boyd's indebtedness, it was necessary to have an accounting of the goods sold and the prices realized therefor. Because the respondent's attachment was sued out and executed before any such accounting was had, and before he or his agent knew, or could know, the amount of Boyd's indebtedness (all which sufficiently appears in the complaint in that action), it must be held that the respondent obtained no lien upon the property attached, as against the appellants, who subsequently attached the same property.

2. Inasmuch as our conclusion on the other point is decisive of the appeal the objections to the sufficiency of the affidavit will be very briefly discussed. The indebtedness of Boyd is thus stated therein: "That the above-named defendant, J. J. Boyd, is indebted to the said plaintiff in a sum

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exceeding fifty dollars, to wit, in the sum of six thousand eight hundred and forty-five dollars and eighteen cents, as near as may be, over and above all legal setoffs, and as this plaintiff is able to determine; and that the same is due upon express contract." It is maintained on behalf of appellants that the insertion therein of the words "and as this plaintiff is able to determine" renders the affidavit insufficient.

In the discussion of the other branch of the case the necessity of stating in the affidavit the amount of the indebtedness for which the writ issues is asserted. True, the statute provides that it is to be stated "as near as may be," and this court has sanctioned the use of that phrase in the affidavit. *Oliver v. Town*, 28 Wis. 328; *Mairet v. Marriner*, 34 Wis. 582. But it was held in *Oliver v. Town* that the phrase introduced no element of uncertainty in the affidavit in respect to the indebtedness or the amount of it. To the same effect is the reasoning of Chief Justice Dixon in *Lathrop v. Snyder*, 16 Wis. 293. We entertain no doubt that perjury may be well assigned on an affidavit to procure the execution of a writ of attachment in which it is alleged the defendant is indebted in a sum specified "as near as may be."

The affidavit under consideration states the indebtedness at a sum certain "as near as may be, . . . and as this plaintiff is able to determine." It is obvious that the meaning of the last sentence is "*as near* as this plaintiff is able to determine." The question is, Does the insertion of this phrase in the affidavit introduce an element of uncertainty in respect to the amount of Boyd's indebtedness to *Hawes?* We think it does. Neither *Hawes* nor his agent who made the affidavit knew the amount of such indebtedness. The statement in the affidavit of the amount thereof was, as we have seen, necessarily a mere estimate, and subsequent events showed it to be a very wild one, for it included the value of goods to the amount of $5,000, which Boyd had not sold,

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and to recover the same goods *Hawes* subsequently brought replevin against the sheriff. We can see no distinction in principle between this affidavit and that in *Lathrop v. Snyder*, where the qualifying phrase was "as near as this deponent can now estimate the same." That affidavit was held insufficient. The case has not been overruled, or its accuracy questioned by this court, although the learned compilers of Shepard's Digest seem to think that *Mairet v. Marriner*, *supra* (and, of course, *Oliver v. Town*, also), establishes a different rule. Shep. Dig. 72, § 17. They are mistaken. Those cases allowed the insertion of a statutory phrase in the affidavit, at the same time holding that it does not render the averment of amount of indebtedness uncertain. *Lathrop v. Snyder* holds that an entirely different phrase, not in the statute, did render such averment uncertain. The rulings are entirely consistent with each other.

3. The ground for the attachment is stated in the affidavit to be that Boyd has absconded from this state. This is claimed to be an insufficient statement, because it is not also averred that he so absconded to the injury of his creditors. The question of the sufficiency of the affidavit in this particular elicited much subtle argument. Its solution depends upon the construction of subd. 1, sec. 2731, R. S.[1] We construe it to mean that it is good cause for executing an

[1] Sec. 2731, R. S., is as follows:

"Before any writ of attachment shall be executed, the plaintiff, or some one in his behalf, shall make and annex thereto an affidavit, stating that the defendant named in such writ is indebted to the plaintiff in a sum exceeding fifty dollars, and specifying the amount of such indebtedness as near as may be, over and above all legal setoffs, and that the same is due upon contract, express or implied, or upon judgment or decree, and containing a further statement that the deponent knows, or has good reason to believe, either:

"1. That the defendant has absconded, or is about to abscond, from this state, or is concealed therein, to the injury of his creditors, or keeps himself concealed therein, with intent to avoid the service of a summons." . . .— REP.

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attachment if the debtor has absconded from the state, regardless of his intention in so doing or the effect upon his creditors.

It was stated in argument that other litigation is now pending between some of these parties in which it is claimed that *Hawes* and Boyd were partners, made such by the terms of the contract above mentioned. This is referred to only as a reason for saying that nothing herein contained is to be construed as an intimation of opinion on that subject, one way or the other.

It results from the views above expressed that the order of the circuit court, that the respondent's judgment and execution be first paid out of the moneys in the hands of the sheriff, must be reversed, and the cause remanded with directions that such moneys be first applied in satisfaction of the appellants' judgments and executions in due order of priority.

By the Court.—It is so ordered.

FULLER and another, Executors, etc., Appellants, vs. GREEN, Respondent.

September 22 — October 13, 1885.

ALTERATION OF WRITTEN INSTRUMENT: PROMISSORY NOTES: FRAUD. *(1) Immaterial alteration does not avoid. (2) Adding witness to note. (3) Intent. (4) What law governs. (5, 6) Fraud: Burden of proof: Compromise of claim.*

1. An alteration of a written contract, which in no way changes the legal effect thereof as between the parties thereto, is immaterial and does not avoid the contract.
2. Merely affixing the name of an attesting witness to a promissory note is not a material alteration thereof.
3. If an alteration is immaterial, the intent with which it was made is immaterial.

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4. The materiality of an alteration is to be determined by its effect upon the rights of the parties under the laws of the state in which the question is raised.
5. If in an action thereon it is shown that a promissory note was obtained by fraud, the burden of proof is upon the plaintiff to show that he is a *bona fide* purchaser for value before due.
6. A promissory note the consideration of which was the compromise of a fraudulent claim, if the maker has not waived his rights, is void in the hands of any person not a *bona fide* purchaser for value before due.

APPEAL from the Circuit Court for *Jefferson* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

"This action was commenced to recover the amount of a promissory note given by the respondent to one George H. Rice. The note had been transferred by Rice to one A. J. Woodward, in whose name the action was originally commenced. Woodward died after the action was commenced, and the present appellants, his executors, were substituted as plaintiffs.

"There was no dispute as to the fact that the defendant executed the note and delivered it to Rice. On the trial in the court below two defenses were relied upon to defeat the action: (1) That after the note had been delivered by the defendant to Rice, it had been altered without his knowledge or consent by adding thereto the name of N. Fredericks as an attesting witness to the note; and, (2) that the note was fraudulently obtained from the defendant without any consideration therefor.

"Upon the first point the evidence tended strongly to show that when the note was executed and delivered by the defendant to Rice, N. Fredericks' name was not placed on the same as an attesting witness, but that he was present when the note was made and delivered by the defendant to Rice. When the note was produced in evidence, Fredericks' name was written thereon as an attesting witness; when it

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was placed there does not appear. The proof shows that it was done without the knowledge or consent of the defendant.

"Upon the second ground of defense the defendant testified that the note was given substantially under the following circumstances: 'About a week before the note in suit was given I was traveling from my home in Jefferson county to Fort Atkinson, in said county, and met a man on the road who was a stranger to me, and whose name I did not then, and do not now, know. This man got into conversation with me, and proposed to sell me a preparation for painting and repairing roofs. I at first refused to purchase or have anything to do with it. The stranger then asked me if I would not put it on my roofs if he would send me a quantity free of charge, so that, when the company or their employees came around to do business another season, there would be something to represent their material. I finally told him I would. He then asked where he should send it, and I told him to Fort Atkinson. After some further conversation as to how it should be used, I told him I would put it on, provided he would send it as directed, and he said he would send me ten gallons. I was to pay nothing for it. He said he would send it. He then presented me a card and asked me to put my name on it. I could not read the card as it was rather small print, and I had not my spectacles with me. He read it over and explained it to me. He said that there was ordered on the card ten gallons. The material was to come from the New York Roofing Company. He said he was the agent for the company. There were to be no charges whatever; the only expense to me was to put it on. He read, or pretended to read, from the card "to send *George J. Green* ten gallons of this preparation." Don't remember the name he called it. There was no price stated, and he stated there was to be no charge. After signing the card we separated. About

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a week after this, Rice, the person to whom the note was given, called upon me, and presented himself as an attorney, and brought a bill, as he represented it, from this roofing company, which he claimed to represent, for two casks of fifty gallons each. The whole bill amounted to $200, or $2 per gallon, and he insisted on my paying the whole bill, $200. He claimed to have a bill of lading for the two casks showing that they were at the depot at Fort Atkinson. The bill he presented was the card I had signed on the road, and purported to be an order for one hundred gallons of the material at $2 per gallon, instead of an order for ten gallons without any charge to me. At first I refused to pay any part of the bill, as I had not ordered it, and would have nothing to do with it. Rice then threatened to sue me immediately unless I paid it or gave my note. Said he had forced others to pay similar claims, and if I did not settle he would bring suit at once; that he would bring suit against me away from home, and it would cost me a good deal of trouble. He finally agreed to take my note for $134.50, and after being threatened with suit if I did not settle, I gave the note for $134.50, which is the note upon which the action was brought. He gave me what purported to be a bill of lading for two casks of the roofing material at Fort Atkinson. I never called for the two casks, and do not know whether they were ever delivered at Fort Atkinson for me or not; never called for it and never have had any of it.'

"There was other evidence in the case, but the foregoing is sufficient to show the application of the instructions of the learned circuit judge to the jury upon the trial.

"Upon the first point, as to the alteration of the note, the learned circuit judge instructed the jury as follows:

"'It is claimed by the defendant that the note in suit has been altered since it was made and executed by the defendant, by one N. Fredericks affixing his name as a witness to the same without the consent or knowledge of the defendant, and that the note in consequence is void.

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"'Upon this point I instruct you that, if you find and believe from the evidence that George H. Rice, the payee of this note, or any other holder of the same, did, without the knowledge, consent, or request of the defendant, fraudulently, and with a view to gain some improper advantage, procure Mr. N. Fredericks to affix his name to the note in question as a subscribing witness to the same after the same was made, executed, and delivered to Rice by the defendant, then the affixing such name of Fredericks to the note, under the circumstances, constitutes a material alteration of the same — rendering it void in Rice's hands, as well as in the hands of the plaintiff, and your verdict must be for the defendant.

"'But if you find from the evidence that N. Fredericks was present when the defendant signed his name to the note, and was knowing of the fact, although he was in an adjacent room and did not in fact see him, the defendant, sign it, and he, Fredericks, afterwards, at the request of Rice, the payee, made in good faith, and with no fraudulent intent, and with no view to gain any improper advantage thereby, fixed his name to the note as a witness to the same, even without the knowledge of the defendant, this would not constitute a material alteration of the note, and would not render the note void.'

"The plaintiff excepted to the second paragraph of the instructions above quoted, and upon this appeal assigns as error the giving of said instructions."

[Upon the second ground of defense the court instructed the jury, among other things, as follows:

"There is another rule of law, equally well established, that in the cases where there is fraud practiced upon the maker of a note, or very strong suspicion of fraud made by the defendant upon the trial, then the holder of a promissory note who sues for its recovery must show that he received it before maturity and for a valuable consideration,

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otherwise, if he don't show that, then the defendant can make his full defense when he has once shown that a gross fraud has been practiced upon him in obtaining the note. It is incumbent then, upon the holder of a note to show that he took it before due, before it became due, for a valuable consideration. If he does show that, even after the defendant shows that he has been defrauded, then the burden of proof shifts again, and the defendant, in order to make his defense must show that the plaintiff had notice of the fraud before he took the note, and that fact being shown, he can make any defense he might make against the original payee."

There was a verdict in favor of the defendant, and from the judgment entered thereon the plaintiff appealed.]

W. H. Rogers, for the appellant.

L. B. Caswell, for the respondent, argued, among other things, that the charge of the court as to the burden of proof was correct. It being shown that the note had its origin in fraud, the burden was upon the plaintiff to show that he was a *bona fide* holder. *Morton v. Rogers*, 14 Wend. 582–3; *Reese v. L., L. & G. Ins. Co.* 39 Wis. 520; *Smith v. Sac Co.* 11 Wall. 139; *Catlin v. Hansen*, 1 Duer, 309; *Hart v. Potter*, 4 id. 458; 5 id. 463; *Bailey v. Bidwell*, 13 Mees. & W. 76; *Sistermans v. Field*, 9 Gray, 331; *Perrin v. Noyes*, 39 Me. 384; *Paton v. Coit*, 5 Mich. 505. The addition of the witness rendered the note void. *Marshall v. Gougler*, 10 Serg. & R. 164; *Brackett v. Mountfort*, 11 Me. 115; *Thornton v. Appleton*, 29 id. 298; *Homer v. Wallis*, 11 Mass. 309; *Smith v. Dunham*, 8 Pick. 246; *Adams v. Frye*, 3 Met. 103; *Sharpe v. Bagwell*, 1 Devereux Eq. 114.

TAYLOR, J. After a careful consideration of the authorities and the reasons for holding that alterations of written contracts, after they are executed, destroy such contracts as to parties not assenting to such alterations, we are of the

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opinion that the instruction excepted to was erroneous and should not have been given.

The old rule of law in England that any alteration, whether material or immaterial, and whether made by a party interested in the contract or by a stranger, rendered the contract void, was long since abandoned; and the reasonable rule has now become firmly established that an alteration of a contract which will render it void must be made by a party thereto or with his knowledge or consent; and, further, the alteration must be material; that is, the alteration must in some way change the legal effect thereof as between the parties thereto. The insertion or addition of words in or to a contract, or the erasing of words therefrom, which do not change the legal effect thereof in any respect, does not render the contract void, and is an immaterial alteration. *Williams v. Starr*, 5 Wis. 534; *Schwalm v. McIntyre*, 17 Wis. 240; *Matteson v. Ellsworth*, 33 Wis. 488; *North v. Henneberry*, 44 Wis. 306, 319, 320; *Krouskop v. Shontz*, 51 Wis. 204, 206; *Palmer v. Largent*, 5 Neb. 223; *Aldous v. Cornwall*, 9 Best & S. 607; *Marson v. Petit*, 1 Camp. 82; *Trapp v. Spearman*, 3 Esp. 57; *Sanderson v. Symonds*, 1 Brod. & B. 426; *S. C.* 4 Moore, 42; *Catton v. Simpson*, 8 Ad. & El. 136; *Gardner v. Walsh*, 5 El. & Bl. 83; *Truett v. Wainwright*, 4 Gilman, 411; 2 Parsons on Cont. (6th ed.), 718–720; *Granite R. Co. v. Bacon*, 15 Pick. 239; *Langdon v. Paul*, 20 Vt. 217; *Huntington v. Finch*, 3 Ohio St. 445; *Nichols v. Johnson*, 10 Conn. 192; *Humphreys v. Crane*, 5 Cal. 173.

The affixing of the name of Fredericks as an attesting witness to the note in question does not change the liability of the maker thereof in any respect. It has no effect in extending his liability under the statute of limitations, nor does it under our laws facilitate or interfere in any way with its proof. Under our law the production of the note proves its execution, unless the signature be first denied

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under oath by the maker. When there is no dispute as to the genuineness of the maker's signature, and therefore no necessity for the person claiming under it making proof of its execution, the fact that the note has or has not an attesting witness is wholly immaterial.

The possibility that the maker of the note and the attesting witness might both die before an action was brought upon it, and in such case the execution of the note might be proved by proving the handwriting of the attesting witness, is too remote and uncertain to be invoked for the purpose of basing a claim that the addition of such attesting witness is a material alteration of the contract. It seems to me the fact that a person who affixes his name as an attesting witness to a contract, when he has not witnessed its execution, cannot, even in the matter of proof of the instrument, be of any effect under any circumstances; for when it is made to appear that the name was so affixed, or, in other words, when the claimed alteration is proved, the party whose name has been affixed as an attesting witness is no longer such witness, and consequently the proof of his handwriting would be no proof of the execution of the contract.

If the alteration be wholly immaterial, and in no way changes the liability of the maker of the note, it seems to us wholly immaterial with what intent such alteration was in fact made. The cases cited by the learned counsel for the respondent from Massachusetts and Maine sustaining the correctness of the instruction — viz., *Brackett v. Mountfort*, 11 Me. 115; *Thornton v. Appleton*, 29 Me. 298; *Homer v. Wallis*, 11 Mass. 310; and *Smith v. Dunham*, 8 Pick. 246 — were all cases where the name of an attesting witness had been added to a promissory note. In these states, when a note is attested by a witness, it extends the liability of the maker under the statute of limitations, and so in fact changes to some extent the nature of the contract and

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enlarges its obligation in the law. In this state there is no such law, and consequently no enlargement of the obligation of the contract by reason of the fact that the note appears to be witnessed. The case of *Adams v. Frye*, 3 Met. 103, was an action upon a sealed bond. The case of *Marshall v. Gougler*, 10 Serg. & R. 164, was an action on a sealed note. Both cases seem to sustain the contention of the respondent and the correctness of the instruction given by the circuit court judge, and may have some weight in those states where the mere production of the note or bond does not prove its execution, and the adding the name of an attesting witness might, therefore, under some circumstances, be an advantage to the holder of the note or bond, and a disadvantage to the maker. Under the laws of this state, we can see no advantage to be gained by placing the name of an attesting witness to a note in favor of the holder of the note, and no disadvantage to the maker, and can conceive of no reason, therefore, why it should render the note void.

We cannot consider the fact that it is possible that an action might be brought upon this note in a state where the law enlarges the statute of limitations because the note is signed by an attesting witness. We can only judge of the materiality of the claimed alteration of the note by the application of our own laws. If the alteration be immaterial under the laws of this state, it cannot affect the rights of the parties in our courts because, in an action brought upon the note in some other state, the question of the alleged alteration might be adjudged a material alteration under the laws of that state, and possibly a different decision might be had. With that question this court has no concern.

The instructions of the learned circuit judge upon the second ground of defense were correct.

The evidence tends strongly to show that the pretended

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claim against the defendant was a fraudulent one, having no element of justice or right in it. We think, upon the evidence, Rice, the man to whom the note was given, must be presumed to have known the fraudulent nature of the claim he made on the defendant, and that the giving of the note under the circumstances was not a compromise of an honest claim on the part of Rice, so as to bind him, but that he may set up the fraudulent nature of the original claim in an action upon the note by Rice, or any other person who is not a *bona fide* holder of the note for value before due. Had the defendant, after giving the note, taken possession of the two casks of paint, there would be strong ground for holding that he had thereby waived any right to set up the original fraud as a defense to the note; but the evidence shows that he did not do so. He may therefore avoid the note on the ground that the acts of Rice in obtaining it were a continuation of the original fraud of the man to whom the defendant gave the order. The transaction cannot be sustained on the theory that the claimed settlement between Rice and the defendant was the compromise of an honest claim made by Rice. See *Kercheval v. Doty*, 31 Wis. 476, 486. In this case Chief Justice DIXON says: "A mere false claim,—a sham one,—set up without any colorable pretense or plausible foundation, might not come within the terms or definition of a compromise, and might not sustain it. Characterized by bad faith, the preferring of such a claim would itself be a fraud, and concessions made or rights yielded on the strength of it would not be lost nor the settlement be a bar." Again, he says: "Fraud, it is said, will vitiate everything, and, no doubt, if shown, would vitiate a settlement." Wharton, in his work on the Law of Contracts, in speaking of the sufficiency of a forbearance to sue as a consideration for a promise to pay the claim, or some part thereof, says: "The fact that the suit is not well founded makes no difference if it has a show

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of title, though it is otherwise in cases of fraud and in cases where the claim to be forborne is utterly destitute of support." 1 Wharton on Cont. § 532, and note. See, also, on this point, *Kidder v. Blake*, 45 N. H. 530; *Pitkin v. Noyes*, 48 N. H. 294, 304; *Nelson v. Serle*, 4 Mees. & W. 795.

There was sufficient proof given on the part of the defendant of the fraudulent nature of the claim made against him upon the note to go to the jury upon that question, and so to shift the burden of proof upon the plaintiff to show that he was a *bona fide* purchaser of the note for value before it became due; and, in the absence of any proof on his part on that point, if the jury found the fraud, the verdict would necessarily be for the defendant.

Because the learned circuit judge misdirected the jury as to the effect of placing the name of Fredericks on the note as an attesting witness, and it is therefore impossible for this court to determine whether the verdict of the jury was based upon the ground that the note was void for that reason or because of the fraud in the transaction between the defendant and Rice, the payee of the note, the judgment must be reversed.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

SINGER, Respondent, vs. BENDER, Appellant.

September 23 — October 13, 1885.

SLANDER: PLEADING. *(1) Innuendo: Enlarging meaning of words. (2) Words injuring business. (3) Averment of correct translation.*

1. A complaint in an action for slander alleged that the plaintiff was a butcher and keeper of a meat market, and that the defendant spoke of and concerning him and his business, the words "That S. (the plaintiff meaning) had taken an unborn calf from a dead cow,

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dressed it, and sold a quarter of it to Mrs. Z. (meaning that this plaintiff had taken an unborn calf from a dead cow, dressed it for his meat market, and sold a quarter of it to Mrs. Z. as food for herself and family to eat)." *Held*, that the innuendo does not enlarge the meaning of the words spoken.

2. Words which tend directly to the prejudice of a person in his trade or business are actionable although they do not impute a crime.

3. A complaint for slander alleged that the defendant spoke certain words in the German language which when translated into English were understood to mean, and do mean, that, etc., and that the words were so understood by the persons to whom they were spoken. *Held*, that this was a sufficient averment of their correct translation.

APPEAL from the Circuit Court for *Waukesha* County.

The action is for slander, and the appeal is from an order overruling a general demurrer to the complaint. The other facts sufficiently appear from the opinion.

For the appellant there was a brief by *Parks & Thompson*, and oral argument by *Mr. Parks*.

David W. Small, for the respondent.

ORTON, J. The respondent, who was plaintiff in the court below, stated in his complaint that he was a butcher and dealer in cattle and provisions, and keeps a meat market for the sale and retail of dressed meats; that the defendant, in a certain discourse concerning the plaintiff in his said trade and business of a butcher and retailer of meats, maliciously spoke, etc., of and concerning the plaintiff, and of and concerning this plaintiff's said trade and business, the following words: "That *Singer* (the plaintiff meaning) had taken an unborn calf from a dead cow, dressed it, and sold a quarter of it to Mrs. Zimmerman" (meaning that this plaintiff had taken an unborn calf from a dead cow, dressed it for his meat market, and sold a quarter of it to Mrs. Zimmerman as food for herself and family to eat). The second count charges the defendant with having spoken of and concerning the plaintiff, and of his said trade and business,

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in the German language, certain words, which, when translated into the English language, were understood to mean, and do mean, that *Singer* (the plaintiff meaning) had taken an unborn calf from a dead cow, dressed it, put it up in said plaintiff's meat market for sale, and sold a quarter of said unborn calf as dressed to Mrs. Zimmerman for food for herself and her family to eat; that said words, as above set out, were well understood as aforesaid by the persons in whose presence and hearing they were spoken as aforesaid; that said plaintiff was injured in his good name, by reason of such speaking, to his damage of $5,000, and that by reason of such speaking many of this plaintiff's customers deserted him and his said meat market, and took the trade and custom they had previously given to the plaintiff to other places, and by reason thereof, among many others, Mrs. Marston, Mrs. Zimmerman, and Mrs. Patrick Fitzgerald, residents of the place where said market was situated, who, at the time, were customers of this plaintiff, have since that time refused to purchase any meat of or from this plaintiff, to his damage of $5,000. A general demurrer to the complaint was overruled.

As we understand the objections taken to this complaint, they are (1) that the innuendo enlarges the meaning of the words spoken, in English; and (2) that the words are not actionable.

1. The words in the innuendo not actually spoken are "for his meat market," and "as food for herself and family to eat." We think the words clearly mean that the plaintiff dressed the calf for his meat market. He cut it into quarters, or at least cut one quarter from it, just as he would do with any other calf for his meat market, and the sale of it to Mrs. Zimmerman was as clearly for the purpose of food for herself and for her family; for she would not have bought a quarter for herself alone, and the only natural and usual purpose of buying a quarter of veal would

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be for food, and not to sell again, but to eat. The words spoken had reference to the plaintiff's business in their most natural meaning, and the innuendoes, we think, very properly connect them specifically with his trade and business, as the keeper of a meat market and vendor of meats. Folk. Starkie, Sland. 355. The language would be meaningless in respect to any other business or person.

2. The words are not actionable as imputing a crime, for they do not imply that Mrs. Zimmerman had not been fully informed of the real character of the unwholesome provisions she was buying, which is an ingredient of the offense. R. S. sec. 4599. But they were spoken concerning the plaintiff's trade and business, and injurious thereto, and he was damaged therein by reason thereof. The averments in these respects are full and complete, and make the words actionable. Folk. Starkie, Sland. 117. The words spoken, from their natural and immediate tendency to produce injury to the plaintiff's trade and business, the law adjudges to be defamatory, and special damages may be alleged and proved in aggravation of damages. Odgers, Sland. 308; *Gottbehuet v. Hubachek*, 36 Wis. 515. Chief Justice RYAN said in that case: "We take it to be an elementary rule that 'words are actionable which directly tend to the prejudice of any one in his office, profession, trade, or business.'" 1 Starkie, Sland. 117; *Lansing v. Carpenter*, 9 Wis. 540; Townsh. Sland. & Lib. 279. The averments in the complaint, in respect to the words having been spoken of the plaintiff in his trade and business, and the special damages occasioned thereby, are according to a precedent (No. 36 in Odgers' Appendix). Charging a butcher with changing a lamb that a customer had bought of him for a coarse piece of mutton is held to be actionable in respect to his trade. Odgers, Sland. 80 and note.

Some question was raised as to the averment of the translation of the words spoken in the German language. But

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the averment that they had a certain meaning in the English language, and that they were so understood by the persons to whom they were so spoken, was held to be a sufficient averment of their correct translation. In *Simonsen v. Herold Co.* 61 Wis. 626, citing Odgers' precedent No. 30, it will be observed that the words of the translation are as broad as the words spoken in English, including the innuendo.

The demurrer was very properly overruled.

By the Court.— The order of the circuit court is affirmed, and the cause remanded for further proceedings according to law.

CUTLER, Appellant, vs. JAMES and others, Respondents.

September 23 — October 13, 1885.

VENDOR AND PURCHASER OF LAND: RECORDING ACTS. *(1) Deed and judgment correcting it. (2) Record of judgment:* Lis pendens. *(3) Quitclaim deed is a "conveyance." (4) Notice of prior conveyance: Burden of proof.*

1. A recorded deed and a judgment correcting it and expanding the description, constitute together a completed conveyance of the same nature as the deed itself.
2. The record of such judgment in the office of the register of deeds will relate back to the time of filing the notice of *lis pendens*, and all purchasers whose conveyances were not then recorded will be bound thereby although they were not parties to the action.
3. A quitclaim deed is a "conveyance" within the meaning of sec. 2241, R. S., and when recorded the grantee therein, if "a purchaser in good faith and for a valuable consideration," will be protected as such against a prior unrecorded warranty deed.
4. Under the circumstances of this case the burden of proving that a defendant, who purchased land from the person in possession and claiming to be the owner thereof, had notice of a prior unrecorded deed from his grantor to the plaintiff, is *held* to be upon the latter.

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APPEAL from the Circuit Court for *Waukesha* County.

The case is thus stated by Mr. Justice CASSODAY:

"Ejectment. The plaintiff claims title to the strip of land in question by virtue of a warranty deed, bearing date May 8, 1879, executed by Morris D. Cutler, but not recorded until February 1, 1882. The defendants claim title to the same strip in *Samuel D. James* by virtue of a deed to him executed by Morris D. Cutler, May 25, 1880, and recorded October 14, 1880, and an action to reform the description therein so as to include the strip of land in question in favor of *Samuel D. James*, and against Morris D. Cutler, and in which due notice of *lis pendens* was filed in the register's office, October 23, 1880, and judgment rendered and entered December 9, 1880, so reforming the description as to include said strip, and which judgment was affirmed by this court, January 16, 1882. *James v. Cutler*, 54 Wis. 172. That judgment was recorded in the register's office, February 2, 1882.

"In addition to the facts stated, which were in evidence, it appeared upon the trial of this action in effect that *Samuel D. James* was in possession, claiming as owner and purchaser from Morris D. Cutler; that at the time he so purchased this strip and other land, the same was between two walls, and that Morris D. Cutler represented to him that he had the title to it, and that thereupon he purchased it of Morris D. Cutler and paid him therefor $625. The other defendants were in possession as tenants of *Samuel D. James*. The court directed a verdict for the defendants, and from the judgment entered thereon the plaintiff appeals."

The cause was submitted for the appellant upon the brief of *J. V. V. Platto*. He argued, *inter alia*, that as the deed to *James* was a quitclaim it conveyed only the interest which the grantor had in the land at the time it was made, and that the grantee in such a deed was not considered a *bona fide* purchaser for value, and was not entitled to pro-

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tection against a prior deed of which he had no actual notice. R. S. sec. 2207; *May v. Le Claire*, 11 Wall. 232; *Woodward v. Baker*, 10 Ore. 491; Co. Litt. sec. 446 (265 *b*); 3 Washb. on R. P. (4th ed.), 607; *Oliver v. Piatt*, 3 How. 333; *Runyon v. Smith*, 18 Fed. Rep. 579; *Richards v. Snider*, 11 Ore. 501; *Bryan v. Uland*, 101 Ind. 477; *Avery v. Akins*, 74 id. 283; *Graham v. Graham*, 55 id. 23; *Jackson v. Hubble*, 1 Cow. 613; *Jackson v. Winslow*, 9 id. 13; *Edwards v. Varick*, 5 Denio, 702; *Springer v. Bartle*, 46 Iowa, 688; *Watson v. Phelps*, 40 id. 482; *Smith v. Dunton*, 42 id. 48; *Light v. West*, id. 138; *Besore v. Dash*, 43 id. 211; *Jackson v. Wright*, 14 Johns. 193; *Jackson v. Bradford*, 4 Wend. 619; *Sparrow v. Kingman*, 1 N. Y. 247; *Fogg v. Holcomb*, 64 Iowa, 621; *Gress v. Evans*, 1 Dak. 387; *Lain v. Shepardson*, 23 Wis. 228; *White v. Winer*, 19 id. 304; *Nichols v. Alexander*, 28 id. 118; *Martin v. Morris*, 62 id. 418.

For the respondents there was a brief by *Parks & Thompson*, and oral argument by *Mr. Parks.*

CASSODAY, J. The recorded deed from Morris D. Cutler to *Samuel D. James*, and the judgment expanding the description therein so as to include the strip of land in question, must together be regarded, between the parties to that action, as a completed conveyance to him of the nature indicated by the language in the deed. The statute expressly declares that "all judgments, . . . in cases where the title to land shall have been in controversy, may be recorded in the office of the register of deeds, . . . *with like effect as conveyances.*" Sec. 2236, R. S. Such judgment, having been duly recorded, must have the same effect as the original deed, with the description corrected, re-executed, and re-recorded, would have had. True, the plaintiff herein was not a party to that action. But the statute, in effect, declares that "from the time" of filing notice of *lis pendens* in such action "the pendency of such

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action shall be constructive notice thereof to a purchaser or incumbrancer of the property affected thereby; *and every purchaser* or incumbrancer, whose conveyance or incumbrance *is not recorded* or filed, *shall be deemed a subsequent purchaser* or incumbrancer, and *shall be bound by the proceedings* in the action to the same extent and in the same manner as if he were a party thereto." Sec. 3187, R. S. This being so, the judgment must relate back to the time of the filing of such notice, and hence, as to such purchasers or incumbrancers, be treated as recorded as of that date. Under that statute, and so far as that action was concerned, the plaintiff must be regarded the same as though he had purchased subsequently to the filing of the notice of *lis pendens* therein, and hence is bound by the proceedings and judgment in that action. *Wright v. Jackson*, 59 Wis. 577; *Coe v. Manseau*, 62 Wis. 89.

Treating the deed as so reformed and re-recorded, even as against the plaintiff, and it is still claimed that it was a mere release and quitclaim of any interest which Morris D. Cutler might have had in the land at the time of its execution, and hence ineffectual as against his prior unrecorded warranty deed to the plaintiff. The statute declares, in effect, that "a deed of quitclaim and release of the form in common use," or "of the form" therein given, "shall be sufficient to pass all the estate which the grantor could lawfully convey by deed of bargain and sale." Sec. 2207, R. S. The form given is simply to the effect that the grantor "hereby quitclaims" to the grantee. And the statute then declares that "such deeds . . . shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of all right, title, interest, and estate of the grantor, either in possession or expectancy, in and to the premises therein described, and all rights, privileges, and appurtenances thereto belonging." Sec. 2208, R. S. These two sections in terms, as it seems to the writer, ele-

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vate a mere "deed of quitclaim and release" into a "deed of bargain and sale." *Russell v. Coffin*, 8 Pick. 143; *Hunt v. Hunt*, 14 Pick. 374; *Matthews v. Ward*, 10 Gill & J. 443; *Givan v. Doe*, 7 Blackf. 210; *Hall v. Ashby*, 9 Ohio, 96; *Wood v. Chapin*, 13 N. Y. 517. Here the grantor, "for and in consideration" of the purchase price paid in and by the deed as reformed, did "give, grant, bargain, sell, remise, release, and quitclaim, unto the said" *Samuel D. James*, "and to his heirs and assigns, forever," the land in dispute, "to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever." The deed itself, especially in connection with the circumstances attending its execution, shows that Morris D. Cutler, in possession and representing himself as the owner of the land, bargained and sold the same for the price named; and in consideration therefor did give, grant, and convey the same to *Samuel D. James*, who, relying upon such representations, paid the price and obtained such reformed conveyance. These attending circumstances may properly be considered as showing the real intent and purpose of the instrument. *Taylor v. Harrison*, 47 Tex. 461.

The question is not whether *Samuel D. James*, by virtue of his deed so reformed and the possession under it, got a better title to the land than the plaintiff had by virtue of his prior unrecorded deed, but whether his deed, so reformed, was such as to entitle him to the protection given by sec. 2241, R. S. That section provides, in effect, that "every conveyance of real estate within this state . . . which shall not be recorded as provided by law shall be void as against any subsequent purchaser in good faith and for a

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valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall first be recorded." Was the deed to *Samuel D. James* so reformed a "conveyance" within the meaning of this section? The statute declares, in effect, that "the term 'conveyance,' as used" in that section, "shall be construed to embrace every instrument in writing by which any estate, or interest in real estate, is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of land." Sec. 2242, R. S. The deed, so reformed, being an "instrument in writing," and not within any of the exceptions named, must, by the very words of the section, be embraced in the term "conveyance," as used in sec. 2241. This view is in harmony with previous utterances of this court, and decisions of other courts under similar statutes. *Wynn v. Carter*, 20 Wis. 107; *Hoyt v. Jones*, 31 Wis. 396 *et seq.; Ehle v. Brown*, 31 Wis. 405; *Helms v. Chadbourne*, 45 Wis. 71–74; *Girardin v. Lampe*, 58 Wis. 267; *Wood v. Chapin*, 13 N. Y. 509; *Hetzel v. Barber*, 69 N. Y. 1; *Westbrook v. Gleason*, 79 N. Y. 30, 31; *Brown v. Banner Coal Co.* 97 Ill. 214; *Shotwell v. Harrison*, 22 Mich. 410; *Fox v. Hall*, 74 Mo. 315; *Bradbury v. Davis*, 5 Colo. 265; *Frey v. Clifford*, 44 Cal. 335; *Graff v. Middleton*, 43 Cal. 341.

Thus it appears that *Samuel D. James* purchased subsequently to the plaintiff, and for a valuable consideration paid at the time, and that his deed, as reformed by the judgment, constituted a conveyance which was duly recorded prior to the time when the plaintiff's deed was recorded, within the meaning of sec. 2241. It also appears that the conveyance to the plaintiff was not recorded until after such completed conveyance to *Samuel D. James* was recorded. From these things it necessarily follows that the conveyance to the plaintiff must be regarded, under

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the section of the statute cited, as void as against *Samuel D. James*, provided it appears from the record that he was a "purchaser in good faith," within the meaning of that section. If *Samuel D. James* so purchased, without any knowledge of the plaintiff's unrecorded deed, or any information sufficient to put him upon inquiry, then, in view of the other existing conditions mentioned, he was such "purchaser in good faith" within the meaning of that section. *Mueller v. Brigham*, 53 Wis. 176; *Fallass v. Pierce*, 30 Wis. 468. True, there is no direct evidence that *Samuel D. James* did not know nor have information of the existence of the plaintiff's unrecorded deed, but all inferences from the facts and circumstances in proof are in that direction and none in the opposite direction. These things being so, we think the burden of proving such knowledge or information was upon the plaintiff, if he had any reason to believe it existed. That such burden was on the plaintiff, under the facts and circumstances disclosed in the record, seems to be sanctioned by the authorities. *Lampe v. Kennedy*, 56 Wis. 254; *Shotwell v. Harrison*, 22 Mich. 411; *Wood v. Chapin*, 13 N. Y. 523.

Finding no error in the record, the judgment of the circuit court is affirmed.

By the Court.— Judgment affirmed.

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WINNINGHOFF, Appellant, vs. WITTIG and another, Respondents.

WITTIG and others, Respondents, vs. WINNINGHOFF, Appellant.

September 23 — October 13, 1885.

(1) Agreement for benefit of third person: Parties. (2-4) Consolidation of actions: Appealable order.

1. Though where one person for a valuable consideration engages with another to do some act for the benefit of a third, such third person may maintain an action for a breach of the agreement, still he is not bound to invoke this rule of law in his favor. Thus, where one person for a valuable consideration agrees to assume a debt jointly with another, the creditor may still maintain an action against the original debtor alone.
2. A consolidation of actions should not be ordered where it would tend to render the trial protracted and embarrassing.
3. Sec. 2792, R. S. does not authorize the consolidation of cross-actions, but only of those which could originally have been joined.
4. An order consolidating two actions is appealable.

APPEAL from the Circuit Court for *Washington* County.

This is an appeal from an order joining *George Kern, Sr.*, and *George Kern, Jr.*, as defendants in an action brought by *Edward Winninghoff* against *Jacob Wittig* and *Louis Kern* to recover a balance of $200 due him on the sale to them of a livery stock and business, and consolidating such action with one brought by the said *Jacob Wittig*, *Louis Kern*, *George Kern, Sr.*, and *George Kern, Jr.*, against the said *Winninghoff* on a bond given by him to *Jacob Wittig* and *Louis Kern* at the time of the sale, not to engage in the livery business again at that place for five years. Other facts sufficiently appear from the opinion.

For the appellant there was a brief by *Paul A. Weil*, attorney, and *Frisby & Gilson*, of counsel, and oral argument by *Mr. Gilson*.

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For the respondents there was a brief by *Cotzhausen, Sylvester, Scheiber & Sloan*, and oral argument by *Mr. Scheiber.*

COLE, C. J. We cannot see that the consolidation of these actions will result in any advantage to any one. It will inevitably delay and embarrass the appellant in the collection of the $200 which is admitted to be due him on the sale of his livery stock and business. He made that sale to *Wittig* and *Louis Kern*, and at the same time gave them his bond for $1,000, conditioned that he would quit the business of keeping livery at West Bend, and would not for five years engage in the business again, either on his own account or as a partner, nor as a servant for any one who was engaged in the livery business, at that place. To his action to recover the $200 balance of the purchase money, the vendees set up in their answer as a defense that the appellant had violated the condition of his bond to their damage of $200. These were the issues in that action. It appears that soon after the sale by appellant to *Wittig* and *Louis Kern*, *George Kern, Sr.*, and *George Kern, Jr.*, became partners with them in the livery business at West Bend, and jointly interested in the observance of the bond by the appellant. And these four persons, as plaintiffs, commenced an action against the appellant to recover the $1,000 stipulated to be paid by him in case of a breach of the bond on his part. The appellant, in his answer to this action, admitted the giving of the bond, and denied the other allegations of the complaint. These were the issues in that action. It appears from the petition of the plaintiffs in the last case mentioned, which was the basis of the motion made on their behalf to consolidate the two actions, that *George Kern, Sr.*, and *George Kern, Jr.*, when they entered into the partnership, agreed to be jointly liable with *Wittig* and *Louis Kern* for all debts and liabilities previously contracted by the latter, including the liability to the appellant for the $200

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unpaid purchase money. The learned circuit court ordered that they be made parties defendant to appellant's action, and then consolidated the two.

The practice has long prevailed, where two or more suits were pending in the same court by the same plaintiff against the same defendant for causes of action which might be joined, to consolidate them into one action when it appeared it would be expedient to do so. 1 Tidd's Pr. 614; 1 Burrill's Pr. 411. Our statute provides that "when two or more actions are pending in the same court which might have been joined, the court or a judge, on motion, shall, if no sufficient cause be shown to the contrary, consolidate them into one, by order." Sec. 2792, R. S. This statute expressly authorized the practice, which had long existed in the English common-law courts, of directing actions to be consolidated which might originally have been joined, in order to avoid costs and the delay resulting from trying several actions between the same parties involving the same question. See 2 Wait's Pr. 555; 2 Till. & S. Pr. 277. But the language of the books is that consolidation will not be ordered in cases where it would tend to render the trial protracted and embarrassing.

In this case the appellant sold his livery stock and the good-will of the business to *Wittig* and *Louis Kern*. He contracted with them, and had the right to look to them alone for his pay. He was not bound to treat *George Kern, Sr.*, and *George Kern, Jr.*, as his debtors, and make them parties to his suit, even though they had engaged with his vendees to become jointly liable for his debt. It is true, it is well settled in this state that where one person, for a valuable consideration, engages with another, by contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement. *Kimball v. Noyes*, 17 Wis. 695; *McDowell v. Laev*, 35 Wis. 171; *Bassett v. Hughes*,

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43 Wis. 319; *Houghton v. Milburn*, 54 Wis. 554. But, of course, it is optional with the party for whose benefit the promise is made to invoke this rule of law or not. He is under no obligation to rely upon it. So it is apparent the appellant was not bound to make *George Kern, Sr.*, and *George Kern, Jr.*, defendants in his action.

But there is a more serious objection to the order of consolidation than the one stated. The cause of action growing out of the alleged breach of the bond was a separate and independent cause of action, not in favor of, but against, the appellant. How was it possible for him to join that cause of action with the one for the purchase money? The statute authorizes the consolidation of actions "*which might have been joined.*" This clearly and necessarily implies actions in favor of the same plaintiff and against the same defendant. See *McCartney v. Hubbell*, 52 Wis. 361. It is said if the appellant had brought his suit against the four partners for the unpaid purchase money, they might have set up, by way of counterclaim, the cause of action arising from the breach of the bond. Suppose that to be so, how does that consideration affect the matter? The appellant surely has a right of action for the money due him on the sale; the partners have a cause of action for the breach of the bond. But these are independent causes of action, one in favor of one party, the other in favor of the opposite party. It seems to us the consolidation has practically the effect of discontinuing the action on the bond, and allowing the obligees to set up that cause of action as a counterclaim to the plaintiff's suit. We do not understand that the practice of consolidation allows this to be done. The statute does not authorize the consolidation of cross-actions. In this case the order of consolidation must necessarily delay and embarrass the appellant, and we think it ought not to have been made.

We are clearly of the opinion that the order is appealable.

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There are two causes on the calendar in conformity to the notice of argument, but really there is only one appeal from different parts of the same order. Only one bill of costs will therefore be taxed.

By the Court.— The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

See note to this case in 24 N. W. Rep. 914.—REP.

FRAEDRICH, Appellant, vs. FLIETH, Respondent.

September 23 — October 13, 1885.

ACTION: PLEADING: PRACTICE. *(1) Action, at law or in equity? Prayer for relief. (2) Question when raised. (3) Waiver of right to trial by court. (4, 5) New trial of equity case after trial by jury: When verdict may be taken as advisory. (5, 6) View by jury in equity case. (7) Amendment of pleading.*

1. Where the complaint prays for relief a part of which is purely equitable, and especially if it states a ground for relief of that nature, the action is an equitable one, triable by the court.
2. The question whether the action is at law or in equity may be raised by an objection to a jury trial, especially if the complaint is not demurrable.
3. If the defendant's objection to a jury trial on the ground that the action is equitable is overruled, he waives no right in that respect by going to trial before the jury.
4. If, after such objection to a jury trial is overruled, and after such trial is had, the trial court is of the opinion that it erred in overruling the objection, it need not order a new trial but may take the verdict as advisory, provided the trial was conducted as it would have been had the cause been regarded throughout as in equity.
5. But where the trial was not so conducted, as where the jury viewed the premises in question and the judge did not, a new trial should be ordered.

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6. A view by a jury called in an equity case to determine a question of fact, should not be allowed unless the trial judge participates therein.
7. An amendment of a complaint changing the action from one in equity to one at law, is inadmissible unless made by consent.

APPEAL from the Circuit Court for *Washington* County.

This is an appeal by the plaintiff from an order setting aside a verdict in his favor, and granting a new trial, and also denying his motion for leave to amend the complaint.

The *gravamen* of the action is an alleged private nuisance created and maintained by the defendant to the injury of the plaintiff. The complaint alleges that the plaintiff is, and has been for many years, the owner and occupant of a certain eighty-acre lot of land; that the defendant is, and for several years has been, the occupant claiming to be the owner of an eighty-acre lot adjoining that of the plaintiff; and that the defendant so obstructed a natural watercourse on his land that the waters thereof ran upon the land of the plaintiff through a ditch dug by the defendant on his own land, and caused and is causing the damage and injury complained of, whereas the stream in its natural state discharged its waters elsewhere. The concluding averments of the complaint and the demand for relief are as follows:

"That the said obstruction of said natural watercourse upon defendant's said land, and the diversion of the water thereof by means of said obstruction and of said ditch to and upon said lands of this plaintiff, are a nuisance to this plaintiff, and if they shall be continued they will cause permanent and irreparable injury to the plaintiff's said lands, and will greatly depreciate their productiveness and value.

"Wherefore the plaintiff demands judgment for his damages as aforesaid in the sum of $250, and also that the defendant be enjoined and restrained from obstructing said watercourse in and upon his said land, and from diverting the waters of said watercourse from their natural course so as

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to cause the same directly or indirectly to flow to or upon the said lands of the plaintiff, or any part thereof, and also that the defendant be adjudged and commanded to remove all obstructions placed by him, or suffered by him to be and remain, in said watercourse on his said land, and to fill up the said ditch, or any artificial channel made, or caused or permitted to be made, by him, whereby the waters accustomed to flow in said watercourse are diverted and caused to flow upon the plaintiff's said land, and that the defendant be adjudged to pay the costs of this action."

The answer denies that the defendant obstructed the watercourse, and alleges that the same became obstructed by natural causes without his agency. It also denies that the plaintiff has been injured to the extent claimed, and alleges that he has an adequate remedy at law. A counterclaim was interposed, but the court sustained a general demurrer thereto.

At the trial term of the circuit court the cause was on the calendar of jury causes. It being called for trial, counsel for the defendant moved that it be stricken from such calendar on the ground that it was not triable by jury. The motion was denied. Thereupon the same counsel objected to the impaneling of a jury for the same reason. The objection was overruled, and there was a jury trial in which the defendant participated.

The jury found specially that the defendant obstructed the watercourse and dug the ditch as charged, whereby the water was diverted from the natural channel and caused to flow on plaintiff's land. They also found a general verdict for the plaintiff, and assessed his damages at $36.

On motion of defendant the court set aside the verdict, and granted a new trial, on the ground that it erred in denying defendant's motion to strike the cause from the jury calendar, and in overruling his objection to the impaneling of a jury.

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Joshua Stark, for the appellant.

For the respondent there was a brief by *Cotzhausen, Sylvester, Scheiber & Sloan*, and oral argument by *Mr. Scheiber*.

LYON, J. 1. The first question is whether the action is at law or in equity. We had the same question in *Denner v. C., M. & St. P. R. Co.* 57 Wis. 218. The complaint in that case contained a demand for relief which it was not competent for a court of law to grant, and for that reason alone it was held that the action was in equity. Because the complaint did not state a cause of action in equity, a general demurrer thereto was sustained. This action was commenced after ch. 190, Laws of 1882, was enacted, and is subject to that statute.

This is a stronger case for holding the action an equitable one than was the case above cited, for it not only contains a demand for exclusive equitable relief, but it also contains an averment that if the alleged nuisance is continued it will work an irreparable injury to the plaintiff, which the statute makes a ground for equitable relief. In an action at law, if an abatement of the nuisance be adjudged, unless the defendant gives security that he will remove it, a warrant issues to the proper officer, requiring him to abate the same. R. S. secs. 3182, 3183. In this case the demand is that the defendant be required to abate the nuisance by removing the obstructions from the watercourse and filling the ditch. No such relief can be granted in an action at law.

The question is quite fully considered in the opinion by Mr. Justice CASSODAY in *Denner v. C., M. & St. P. R. Co.*, and nothing more need be said upon it. We think this case is ruled by the judgment in that case. It is immaterial that the question there arose upon a demurrer to the complaint, while here it arose upon an objection to a jury trial. In his case a demurrer would have been fruitless, because the

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complaint states a good cause of action in equity. The point seems to have been made at the first opportunity. In either case the character of the action must be determined by the complaint. We conclude that the action is in equity, and the rulings of the court to the effect that it is an action at law were erroneous. The circuit court so held on the motion to set aside the verdict and for a new trial.

2. It is maintained by counsel for the plaintiff that, although the action is in equity, a new trial should not have been granted for that reason alone, but that the court should have treated the verdict as though the questions answered therein had been specially submitted to the jury under the power of the court in its discretion to take the verdict of a jury on questions of fact involved in equity causes; and hence that the court should have determined the case by approving the verdict if satisfied with it, and if not so satisfied, by finding the facts from the evidence independently of the verdict, and should have given judgment accordingly. We perceive no valid objection to the practice here suggested in a case in which the court has before it all the evidence, and the trial has been conducted as it would have been had the cause been regarded throughout as in equity. In such a case, although the cause has been regarded as one at law, no good reason is apparent why parties should be subjected to the delay and expense of another trial.

In the present case a material question of fact raised by the pleadings is, Did the defendant obstruct the watercourse on his land as alleged in the complaint? He avers that the obstruction complained of was the result of natural causes with which he had nothing to do. The jury viewed the premises. The testimony given on the trial is not preserved in the record. We cannot know to what extent the finding for the plaintiff on the above question is based upon what the jury saw. The obstruction to the watercourse may

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or may not have been of such a character that from an inspection the jury could determine its origin. The circuit judge had no view of the alleged obstruction. Hence the evidence which the inspection furnished the jury was not before the judge, and could not be unless he also should make a view. Under these circumstances we cannot say that the circuit judge was in a position to review and affirm or set aside the verdict of the jury on the question whether the obstruction was natural or artificial. When a question of fact in an equity case is submitted to a jury, the verdict is merely advisory, and it is competent for the court to find the fact against the finding of the jury. To do this, however, or to review the verdict intelligently, it is necessary that the court have all the evidence which the jury had. In this case, as we have seen, the evidence furnished by the view (which may be important) was not before the court. Hence, when the court held that the action was of equitable cognizance, it found itself in no position intelligently to review the verdict as one merely advisory, and no course seemed open but to award a new trial. We do not think it was error to do so.

We conclude this branch of the case with the remark that a view by a jury called in an equity case to determine a question of fact should not be allowed unless the trial judge participates therein. The reason is obvious from what has already been said.

3. We do not think the defendant waived any right by going to trial before the jury, after the court, against his objection, had held that to be the proper forum. It is somewhat in the nature of an objection to jurisdiction of the subject matter, which cannot be waived.

4. When the motion for a new trial was made, counsel for plaintiff asked leave to amend his complaint by striking from the demand for judgment every demand contained in it except for damages and costs. Leave was refused.

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The only effect of the amendment, had it been allowed, would have been to change the action from one in equity to one at law. Such an amendment is inadmissible, unless made by consent, and the court properly refused to allow it. *Carmichael v. Argard*, 52 Wis. 607, and cases cited in the opinion; *Kavanagh v. O'Neill*, 53 Wis. 101.

By the Court.— The order of the circuit court is affirmed.

NEWTON, Respondent, vs. LEARY, Appellant.

September 23 — October 13, 1885.

UNLAWFUL DETAINER: JUSTICES' COURTS. *(1, 2) Plea of title: What issues may be raised: Jurisdiction. (3) Judgment on* certiorari: *Restitution.*

1. Under the statutes "of forcible entry and unlawful detainer" (ch. 145, R. S.) the question of title does not arise and cannot be put in issue by the pleadings.
2. But the facts upon which the right of removal under subd. 1, sec. 3359, R. S., is based, may be put in issue by the answer, and the issues so raised may be tried and determined in a justice's court.
3. On *certiorari* to a justice of the peace, the circuit court can only reverse or affirm his judgment, with costs. Even on reversing a judgment in an action of unlawful detainer under which the plaintiff has been put into possession of the premises, it cannot award a writ of restitution.

APPEAL from the County Court of *Dodge* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

The defendant in error, and appellant, brought an action in justice's court against the plaintiff in error, and respondent, for the purpose of removing him from the possession of lands described in the complaint. The action was brought under ch. 145, R. S., "Of Forcible Entry and Unlawful Detainer."

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This action was brought under the first subdivision of sec. 3359, R. S., being a part of said chapter, and which reads as follows: "Sec. 3359. In the following cases any person who holds possession of real property, after the demand of the possession thereof has been made, and the assigns, tenants, or representatives of such persons, may be removed in like manner [referring to the manner of removing tenants holding over, etc.]: (1) When the property has been duly sold upon the foreclosure of a mortgage, under the provisions of chapter one hundred and fifty-two, which was executed by such person, or any person under whom he claims by title subsequent to the date of the recording of such mortgage, and the title under such foreclosure has been duly perfected."

The complaint of the plaintiff in the justice's court was made under the section above quoted, and, although very general in its terms, was, we think, sufficient, especially in the absence of any demurrer to the same.

The plaintiff in error appeared in the justice's court and answered the complaint as follows: "The defendant, for answer to the complaint in this action, alleges that he is owner in fee of the lands and premises described in the complaint, and did so own and was so possessed at the date of the commencement of this action, and that the plaintiff in this action is not the owner of the same, or any part thereof, and did not own the same, or any part thereof, at the date of the commencement of this action, and was not then, and is not now, owner or is entitled to the possession of the same, or any part thereof; and the defendant denies that the holding and possession is unlawful, but he says that he holds the same under a title thereto in fee, by deed prior and paramount to any and all claim of the plaintiff, and that such title will come into question and must of necessity be decided in this action. And for a second answer the defendant says at the date of the commencement of this

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action he was, and still is, lawfully seized in fee and possessed of the premises, and that the pretended foreclosure sale under which the plaintiff claims was and is illegal and void, because there was no power of sale in the mortgage under which the pretended sale was made; because the amount secured by the mortgage was not due at the date of the sale, and no breach of the conditions of said mortgage, or either of them, had occurred; because the notice of sale under which plaintiff claims title was not published as required by law; because no such notice of sale was given as required by law; because the said mortgage has been, and was before the commencement of the action, fully redeemed, paid, and satisfied."

At the time of filing his answer the defendant tendered a bond as required by sec. 3620, R. S., when a plea of title is put in as authorized by sec. 3619, R. S., in an ordinary action pending in a justice's court. After filing his answer and tendering his bond, the defendant made no further defense to the action in justice's court. The justice rendered judgment in the action in favor of the plaintiff and against the defendant, and upon such judgment issued a warrant to put the plaintiff in possession of the premises, and to remove the defendant therefrom.

Afterwards the defendant sued out a writ of *certiorari* from the county court of Dodge county to the justice's court, and in obedience to the command of said writ, the justice certified and returned the record of his proceedings in said action to said court. And afterwards, on the 3d day of June, 1884, the said county court, after hearing the arguments upon the return to said writ of *certiorari*, rendered a judgment reversing the judgment of the justice's court, with costs, and also directed that a writ of restitution issue out of said court, ousting the defendant in error and putting the plaintiff in error into the possession of the lands and premises described in the complaint.

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From the judgment of the county court the defendant in error appeals to this court.

The cause was submitted for the appellant on the brief of *Eli & C. E. Hooker*, and for the respondent on that of *Edward S. Bragg*.

For the respondent it was contended, *inter alia*, that the circuit court did not err in awarding the writ of restitution. Every court has inherent power to execute its own judgments, and the writ of restitution is the execution of the circuit court to compel a complete reversal of the proceedings below. Bacon's Abr. FORCIBLE ENTRY (G.); *People v. Shaw*, 1 Caines, 124; *In re Shotwell*, 10 Johns. 304; *Comm. v. Bigelow*, 3 Pick. 31. The basis for the declaration that on *certiorari* the judgment can only be affirmed or reversed, is found in the fact that nothing but the record comes to the higher court and it cannot know anything of the merits. But here the writ by which the plaintiff was put in possession, and the sheriff's return, are part of the record, and properly so. Subd. 12, 13, sec. 3574, R. S. Upon reversal the plaintiff in error should be restored to all things which he has lost by reason of the judgment reversed, if such things are still in the possession of the adversary *in specie*. *Cummings v. Noyes*, 10 Mass. 433; Freeman on Judgments, § 482; *Gott v. Powell*, 41 Mo. 416; *South Fork Canal Co. v. Gordon*, 2 Abb. (U. S.), 479–488; *Ex parte Morris and Johnson*, 9 Wall. 605; *Kennedy v. Duncklee*, 1 Gray, 67–8; *Delano v. Wilde*, 11 id. 17.

TAYLOR, J. Upon the hearing in this court the appellant and defendant in error contends (1) that there was no error in the judgment of the justice, and that the county court should have affirmed the same; and (2) that the county court erred in ordering a writ of restitution in favor of the plaintiff in error, even though the county court was right in reversing the judgment of the justice.

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The contention of the respondent upon this appeal is that, upon the filing of his answer in the justice's court and tendering his bond as above set forth, the justice lost all jurisdiction to try the action, and consequently his subsequent proceedings and judgment were void and were properly reversed by the county court. He also insists that there was no error committed by the county court in ordering restitution of the premises to the plaintiff in error, who had been ousted by the judgment of the justice.

We are very clearly of the opinion that the answer filed by the plaintiff in error in the justice's court, so far as it attempted to set up an adverse title to the lands in question as against the plaintiff in said action, was no defense to the proceedings to dispossess him, and as a plea of title it was not an admissible plea in said action; and that, so far as the answer sets up facts showing that the claimed foreclosure sale had not been legally made, it was a good answer to the complaint, and the justice's court had jurisdiction to try the issues raised by such part of the answer, and the tender of the bond as on a plea of title under the provisions of sec. 3620, R. S., did not oust the justice of his jurisdiction to try the action. See cases cited below.

It has been repeatedly held by this court that, under the statute of "forcible entry and unlawful detainer," the question of title to the premises does not arise, and cannot be put in issue by the pleadings. Where the proceeding is for a forcible entry or for a forcible detainer, it is the nature of the entry or detainer which constitutes a cause of action, and not the nature of the title which the respective parties have in the premises. *Bracken v. Preston*, 1 Pin. 365; *Eastman v. White*, 3 Pin. 180; *Cox v. Groshong*, 1 Pin. 307; *Ferrell v. Lamar*, 1 Wis. 8; *Gates v. Winslow*, 1 Wis. 650; *Jarvis v. Hamilton*, 19 Wis. 187; *Ainsworth v. Barry*, 35 Wis. 136; *Steinlein v. Halstead*, 42 Wis. 422; *Carter v. Van Dorn*, 36 Wis. 289. And in cases under those provisions of the

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chapter which authorize a landlord to dispossess his tenant under proceedings similar to those for the dispossession of a person who has forcibly entered upon the possession of another or forcibly detains such possession from him, the only questions to be tried are — (1) whether the relation of landlord and tenant exists between the plaintiff and defendant; (2) whether such tenant holds over after the term of his lease has expired, or after he has violated some provision thereof, or, if the proceeding is taken for the nonpayment of rent according to his lease, whether such rent is in part unpaid; and (3) whether the proper notice has been given before the action is commenced. All these questions the justice has power to try. See *Jarvis v. Hamilton*, 16 Wis. 574; *People v. Godfrey*, 1 Hall, 240; *Savage v. Carney*, 8 Wis. 162; *Winterfield v. Stauss*, 24 Wis. 394; *Ragan v. Simpson*, 27 Wis. 355; *Ela v. Bankes*, 32 Wis. 635; *Strain v. Gardner*, 61 Wis. 174.

The provision of law under which this action was commenced is new, and was first enacted as a part of ch. 145, R. S. 1878, and was clearly not intended to permit a justice of the peace to try a pure question as to the title of real estate, nor to authorize a defendant in such action to set up an adverse title as a defense to the action. If he has such adverse title the plaintiff will be unable to make out his cause of action. *Ragan v. Simpson*, 27 Wis. 355. In order to recover in such proceeding where the answer properly denies the allegations of the complaint, the plaintiff must prove — (1) that there was a mortgage on the premises which was executed by the defendant, or some other person under whom the defendant claims by title subsequent to the date of recording such mortgage; and (2) that such mortgaged property has been duly sold upon the foreclosure of such mortgage under the provisions of ch. 152, R. S., and that the title under such foreclosure has been duly perfected in the plaintiff. The enactment of these provisions

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of law, and conferring the power upon a justice's court to entertain an action to try the rights of the parties in such case, clearly confers upon the court power to try the questions which may be raised by the pleadings in such action. It is not to be presumed that the legislature intended that a justice's court could entertain and try a case of this kind only when the defendant admitted all the allegations necessary to be made by the plaintiff in his complaint to sustain his action; and that when the defendant denied any of the material allegations of the complaint, it would raise an issue of title which such court could not try. The very fact that a plaintiff is compelled to bring such an action is evidence that the defendant contests his right to the possession sought by him.

The power of the justice's court to try all the issues which may be raised upon the material allegations of the plaintiff's complaint in this proceeding is, we think, very clear. See cases above cited. If it be not so, then the act is worse than useless, and it was a piece of folly to enact it.

If the first part of the defendant's answer filed in the action simply means that he is not in under the mortgagor whose mortgage had been foreclosed, then it was a good defense to the plaintiff's action; and so far as it raised any question of title, it was triable by the court, because the plaintiff can only recover upon proof that the defendant is either the mortgagor or claims under him. See *Ragan v. Simpson*, *supra*.

In a case of landlord and tenant this court held that when an assignee of the lessor brought an action under this statute, the justice necessarily had the power to try all questions relating to the assignment or assignments under which the plaintiff claimed, even though such proofs required the production of deeds or other conveyances from the original landlord. See *Savage v. Carney*, 8 Wis. 162; *Winterfield v. Stauss*, 24 Wis. 394, 398.

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We think the justice had jurisdiction of the action, and properly proceeded to try the case, notwithstanding the defendant's answer and tender of his bond under the provisions of sec. 3620, R. S.; and that being so, the county court erred in reversing the judgment upon the writ of *certiorari.*

We are also of the opinion that the court erred in awarding a writ of restitution as a part of its judgment; and that this would have been error even though the judgment reversing the justice's judgment had been properly entered. It has been repeatedly held by this court that upon a common-law writ of *certiorari*, issued by an appellate court to review a judgment of a justice's court, the appellate court can only review the jurisdiction of the justice's court to render the judgment. No other questions are involved. The evidence in the court below is not considered, nor any rulings of the court on the trial; and as a result of this rule, the only judgment which the appellate court can render in such case is a judgment reversing or affirming the judgment of the justice's court. No judgment affecting the rights of the parties as to the matter of the controversy is determined by the appellate court. *Healy v. Kneeland*, 40 Wis. 497; *Bandlow v. Thieme*, 53 Wis. 57; *Smith v. Bahr*, 62 Wis. 244; *Starkweather v. Sawyer*, 63 Wis. 297.

The impropriety of rendering a judgment for a restitution of the premises in this case, where the court has none of the evidence before it, and therefore is unable to tell whether, in justice and right, the possession ought to be restored to the plaintiff in error, is shown by the decision of this court in the case of *Towle v. Smith*, 27 Wis. 268. In that case, upon an appeal from the judgment of the justice in a proceeding for forcible entry and detainer, the judgment of the justice was reversed, and yet the court refused to remove the party who was put in possession by the judgment of that court, because, from the evidence in the

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case, it would be inequitable to do so. The cases cited by the learned counsel for the respondent to sustain this part of the judgment of the justice are from states where the law upon the subject is very different from the law in this state. In New York the review of the proceedings of the justice's court is expressly given by statute, and brings up all the proceedings and evidence in the case; and, presumably, it is the same in Massachusetts. In this state the law expressly gives an appeal from the judgment of the justice, and upon such appeal a new trial is had in the appellate court, where the rights of the parties can be determined upon hearing the evidence of the parties. If a party does not desire a new trial in the appellate court, he may, under the laws and constitution of this state, have the proceedings reviewed upon a common-law writ of *certiorari*, but in that case the only question for review is the jurisdiction of the court to render any judgment in the case. In this proceeding the rights of the parties, as between themselves, are not considered by the court, and no judgment affecting such rights ought to be pronounced by the appellate court.

By the Court.—The judgment of the county court is reversed, and the cause is remanded with directions to the county court to affirm the judgment of the justice.

SOLVERSON, Respondent, vs. PETERSON, Appellant.

September 23 — October 13, 1885.

Libel.

To state in writing of a man that he "has turned into an enormous swine, which lives on lame horses," and that he "will probably remain a swine the rest of his days," is libelous *per se*.

APPEAL from the County Court of *Dodge* County.

Action for libel. The case is sufficiently stated in the opinion.

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For the appellant there was a brief signed by *Brown & O'Connor*, of counsel, and *A. K. Delaney*, attorney, and the cause was argued orally by *Mr. Brown*. They contended, *inter alia*, that if it is to be understood literally the charge that the plaintiff had become a swine is not libelous, for to allege a known impossibility is not actionable. *Fen v. Dixie*, Jones (W.), 444, Pl. 5; *Ausman v. Veal*, 10 Ind. 355. If it is to be understood figuratively — if the word is used in an acquired sense, then an averment by way of inducement of that acquired sense is necessary; but we have here neither averment nor innuendo. Townshend on S. & L. 180, *n;* Folkard's Starkie on S. & L. (Wood's ed.), § 443; *Rawlings v. Norbury*, 1 Foster & F. 341; *Rex v. Horne*, 2 Cowp. 672; *Hays v. Mitchell*, 7 Blackf. 117; *Angle v. Alexander*, 7 Bing. 119; *McGregor v. Gregory*, 2 Dowl. (N. S.), 769; *More v. Bennett*, 48 Barb. 229, 232; 30 How. Pr. 177, 180; *Capel v. Jones*, 56 Eng. C. L. 259; *Hearne v. Stowell*, 12 Ad. & El. 719. A publication which, like this, does not affect its subject in his business, profession, or official capacity, and does not impute to him any infectious disease, is not libelous unless it imputes some offense or moral delinquency. *Rice v. Simmons*, 2 Harr. 417; *S. C.* 31 Am. Dec. 766; *Colby v. Reynolds*, 6 Vt. 489; *S. C.* 27 Am. Dec. 574. Even if it can be said to subject the plaintiff to ridicule in the general and popular sense of that term, he is not subjected to that species of contemptuous derision known to the law of libel as "ridicule." In its original and legal sense that word is substantially synonymous with the terms "public hatred" and "contempt," and is so used in the leading cases, and in all the cases in this court. In no case has mere raillery, or even ill-natured abuse without the imputation of moral delinquencies, been held libelous. See *Cropp v. Tilney*, 3 Salk. 225; Holt, 426; *Thorley v. Lord Kerry*, 4 Taunt. 355; *Capel v. Jones*, 4 C. B. 259; *Steele v. Southwick*, 9 Johns. 214; 1 Am. Lead. Cas. 129; *Cramer v. Noonan*, 4 Wis. 231;

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Cary v. Allen, 39 id. 481; *Cottrill v. Cramer*, 43 id. 242; *Platto v. Geilfuss*, 47 id. 491; *Gough v. Goldsmith*, 44 id. 262.

For the respondent the cause was submitted on the brief of *H. K. Butterfield.*

Orton, J. The appellant, the defendant in the circuit court, interposed a general demurrer to the complaint, which was overruled. The only question on this appeal is whether the alleged publication is libelous. The main facts stated in the complaint are as follows: The libelous article was published by the defendant of and concerning the plaintiff in the Oconomowoc *Local*, a paper published in Waukesha county, and in circulation in the county of Dodge, where the plaintiff resided, and which was read and understood by many persons, and tended to expose the plaintiff to public ridicule, and did so expose him, and it was published by the defendant for the purpose of exposing him to public hatred, contempt, and ridicule. The main charges in said publication are as follows: The plaintiff is spoken of as the "king of the Norwegians,—a character so mystical and eccentric that every one would be interested to hear from him." "He takes us back to the time when the star of human progress was just rising above the dark horizon of human ignorance; when the king of Babylon was changed into an ox and lived on grass." "But let us doubt such things no longer, when I tell you that at the present time this great king, in whose veins courses the blood of the ancient viking, has turned into an enormous swine, which lives on lame horses," etc. "He still retains the faculty of speech." "Great sympathy is felt for him by Norwegians all over the world, who keep sending him lame horses. Doctors say there is no hope for his recovery, and he will probably remain a swine the rest of his days."

The plaintiff is here ironically spoken of as a king and a

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descendant of kings, as if he had assumed such a high character among his countrymen, and he is compared to the king of Babylon, who fell so low as to eat grass in the fields, and he is said to have turned into an *enormous swine*, living upon the *carrion* of lame horses, as the public not cognizant of the particular meaning intended by the allusion to "lame horses" may well understand, and he barely retains the faculty of speech, and there is no hope of his recovery, and he will probably always remain a *swine*. Is not this the most offensive kind of ridicule and most intensely contemptuous, and does it not tend, and was it not intended, to bring the plaintiff into ridicule and contempt, and to injure his standing and reputation as a citizen? How could a man be lower, meaner, or more filthy than to have the character, habits, and ways of a *swine*. Of course no one would understand that the defendant intended to charge the plaintiff with being veritably a hog. The plaintiff is compared with this low and filthy animal to indicate that he has fallen to the very lowest degree of human degradation, morally, intellectually, and physically. It was supposed that the prodigal had fallen to the very lowest condition when he became the associate of swine, and lived upon the same food. "Words which hold the plaintiff up to contempt, hatred, scorn, or ridicule" are libelous. Odgers, Lib. 21.

This is the common definition of libel. Is it difficult to see that these words fall within this definition? Words of comparison may be as libelous as those importing a direct charge; such as, "He is thought no more of than a horse-thief and a counterfeiter." *Nelson v. Musgrave*, 10 Mo. 648. "A frozen snake." *Hoare v. Silverlock*, 12 Q. B. 624. "An itchy old toad." *Villers v. Monsley*, 2 Wils. 403. "He is a black sheep." *M'Gregor v. Gregory*, 11 Mees. & W. 287. "Likening persons to certain animals," such as imputing to a person their qualities, may be libelous. Folk.

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Starkie, Sland. 165. The learned counsel of the appellant claims that the language used in this publication is equivocal or ambiguous. If these words mean anything, they mean to attribute to the plaintiff the meanest of character and conduct. They certainly have not two meanings, one of which may be innocent and the other libelous. They are not ambiguous. It is further claimed that the words are not libelous because their allusions to certain transactions, which give to them a particular meaning, are not understood or explained by innuendo, and hence they have a doubtful meaning; and it is said in the brief of the learned counsel for the appellant, by way of illustration: "A man may be called a swine because he is gluttonous, or because he is grasping or self-seeking, and the court cannot say in which of these senses the word is here used." If this word may be understood to impute either or both of these base qualities to the plaintiff it is sufficient.

In comparing the plaintiff's present character and condition with that of a swine, the publication does not limit the imputation to any particular quality of that animal, and therefore the public may well understand that it was intended to impute to him all of the offensive qualities of a hog, and certainly the article was not intended to give the plaintiff the credit of having any of the good qualities of that animal, if it has any. The obvious meaning of the publication is well expressed by the learned counsel in his brief, even at a close risk of a repetition of the libel, when he says: "It seems most likely, therefore, that the libelous charge which rankled and festered in the plaintiff's breast for the nine long weary months between the publication of this alleged libel and the commencement of this action *was that he, the king of the Norwegians, who had so long enjoyed the confidence and esteem of the community, had become a swine, or, to put it as it is more commonly and vigorously put, a hog*," *i. e.*, like a hog, as far as a man can possess the offen-

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sive characteristics of a hog. A precise precedent of this libel may not be found in the books, but it clearly falls within the rule of all cases in which the libel contained a gross imputation upon the character and conduct of the plaintiff, tending to bring him into ridicule and contempt, and the citation of the thousands of quite similar cases is unnecessary. The sum of all of them is "that language in writing (concerning an individual as such) is actionable *per se*, which denies to a man the possession of some such worthy quality as every man is *a priori* to be taken to possess, or which tends to bring a party into public hatred or disgrace, or to degrade him in society, or to expose him to hatred, contempt, or ridicule, or which reflects upon his character or imports something disgraceful to him, or throws contumely on him, or contumely and odium, or tends to vilify him or injure his character, or diminish his reputation, or which is injurious to his character, or social character, or shows him to be immoral or ridiculous, or imputes to him a *degradation* of character," etc. Townsh. Sland. & Lib. § 176.

It is too clear for further argument that this case falls far within these rules. The demurrer was properly overruled.

By the Court.—The order of the circuit court is affirmed, and the cause remanded for further proceedings according to law.

See note to this case in 25 N. W. Rep. 16.—REP.

FITZGERALD, Respondent, vs. THE CITY OF BERLIN, Appellant.

September 24—October 13, 1885.

Municipal corporations: Defect outside of traveled portion of sidewalk.

A municipal corporation is not responsible for an injury caused by a defect in a private structure (in this case an insufficiently guarded stairway leading to a basement) made by a lot-owner on his own

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land entirely outside of the traveled portion of the sidewalk and not connected therewith in such a way as to endanger the safety of those traveling thereon, even though such structure happens to be within the line of the street as originally surveyed.

APPEAL from the Circuit Court for *Dodge* County.

The case is thus stated by Mr. Justice CASSODAY:

"This action is to recover damages for personal injuries sustained on the evening of December 31, 1877, by reason of a defective sidewalk in the defendant city. The defense was, in effect, that the *locus in quo* was the stairway to the basement of a lot-owner's building, and his private property, which was properly guarded, and had existed in that condition for more than twenty years, and that no part of it was in the public street or sidewalk; and that the plaintiff's negligence contributed to the injury.

"The first trial resulted in a verdict for the plaintiff, which was reversed for intervening error. 51 Wis. 81. On the last trial the jury returned a special verdict to the effect (1) that the plaintiff fell down the stairway; (2) that the opening was wholly within the north line of Broadway street; (3) that such north line was on the south line of the buildings on the north side of that street; (4) that the opening was protected by a bar across the west end, prior to the accident; (5) and that was not a sufficient protection; (6) that the plaintiff was familiar with this opening before and at the time of this accident; (7) that the plaintiff could not, by the exercise of ordinary care, have seen the opening when he came out of Soper's saloon just before the accident; (8) that the plaintiff was not then intoxicated; (9) nor guilty of any negligence which contributed to the injury; (10) that they found for the plaintiff; (11) and assessed his damages at $1,300. From the judgment entered thereon, the defendant appeals."

For the appellant there was a brief by *Waring & Eichstaedt*, and oral argument by *Mr. Waring*.

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For the respondent there was a brief by *Finch & Barber*, attorneys, and *T. W. Spence*, of counsel, and oral argument by *Mr. Spence*.

CASSODAY, J. The following facts are not disputed: Broadway ran east and west. Along the north side of it was a continuous sidewalk, at least six or seven feet wide, passing the *locus in quo* in both directions. The south line of the buildings fronting on this sidewalk was some four or five feet north of the north line of such continuous sidewalk. Between the front ends of these buildings, or most of them, and such continuous line of sidewalk, there were plank walks, the surface of which corresponded substantially with the surface of such continuous walk. Such, however, was not the case at street crossings, nor generally at vacancies between buildings. The stairway in question went down from the west towards the east from near the southwest corner of Galloway & Bassett's store into the basement thereof. This stairway was properly guarded on the east and south by a railing, but not at the entrance to the stairs, except as stated in the verdict. Directly east of the store was a saloon kept by Joyce, and immediately west of the store was a saloon kept by Soper. In the space between the south line of these buildings and such continuous sidewalk (except the space occupied by the stairway and railing) there were intervening walks made of plank, the surface of which corresponded substantially with the surface of the continuous sidewalk. On the evening in question the plaintiff came out of Joyce's saloon and walked westerly around the stair-railing, and went into Soper's saloon. When he came out of that saloon, instead of going out onto the continuous walk and then going east, he fell down the stairway and was injured.

It is claimed on the part of the defendant that the undisputed evidence shows that the north line of the street, as originally surveyed and opened, was substantially on the

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north line of such continuous sidewalk and south of the stairway. On the part of the plaintiff it is claimed that there is evidence tending to show that such north line of the street is on the south line of such buildings. For the purposes of this appeal we shall assume that the plaintiff's claim is well founded. The court charged the jury, among other things, in effect, that "if the opening or stairway was within the north line of Broadway street, then the city was bound to keep it in a safe condition; and if it was not so kept, and the accident happened without the fault of the plaintiff," then the defendant was liable. And, again, "if you find from the evidence that a portion only of this entrance was within the line of the street, it was equally the duty of the city to keep such portion in a safe condition and in good repair."

Under these instructions and the questions submitted, the jury were at liberty to find the defendant liable if the stairway, or some portion of it, was within the north line of the street as originally surveyed, even though no portion of it "was within the limits of the sidewalk ordinarily used and traveled by the public." This was in direct conflict with the ruling of this court on the former appeal. 51 Wis. 84. In that case Mr. Justice LYON, after stating that the city was guilty of no neglect of duty in the case supposed, said that "the jury should have been so instructed." He further said: "We think the instruction proposed on behalf of the city, quoted in the foregoing statement of the case, is substantially correct, and should have been given." The same error was repeated by rejecting substantially the same instruction upon the last trial. The reason given is, in effect, that the last trial was on the theory of the defendant's liability if the stairway, or any portion of it, was within the line of the street as originally surveyed,— a feature said not to have been present on the first trial. But we are not prepared to hold that a city is responsible for the existence of

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a private structure made by a lot-owner on his own land entirely outside of the traveled portion of the sidewalk, and not connected therewith in such a way as to endanger the safety of those traveling thereon, even though such structure happens to be within the line of the street as originally surveyed. To so hold would subject cities, villages, and towns to liability for defects in private walks leading from the public sidewalk to private buildings in every case where such defect happened to be within the line of the original survey. It frequently happens that streets and highways are not laid out upon nor opened up to the exact lines of the original survey. It is only such portions of the street or highway as have been used by the public for travel thereon which are required to be kept free from defects. *Matthews v. Baraboo*, 39 Wis. 677. Where the defect complained of is wholly outside of the traveled track or sidewalk used by the public for travel, and not connected therewith so as to endanger the safety of such public travel thereon, there can be no recovery, notwithstanding the same was within the lines of the original survey of the street or highway, and in a private walk leading from such traveled track or sidewalk to a private building or private place of business. *Cartright v. Belmont*, 58 Wis. 373.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

BEGG, Appellant, vs. ANDERSON and others, Respondents.

September 24 — October 13, 1885.

Evidence: Equivocation in deed: Identity of grantee.

A finding of the jury that the son, who was of the same name as his father, was the grantee named in a deed, is held to be sustained by the evidence.

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APPEAL from the Circuit Court for *Waukesha* County.

Ejectment. A sufficient statement of the pleadings, showing the questions involved, will be found in the report of a former appeal in 56 Wis. 534. The defendant *Ann Adel Anderson* was formerly *Ann Adel Begg*, the widow of James Begg, Jr., deceased.

The plaintiff appeals from a judgment in favor of the defendants.

D. H. Sumner, for the appellant.

For the respondents there was a brief by *A. Cook* and *P. H. Carney*, attorneys, and *J. V. V. Platto*, of counsel, and oral argument by *Mr. Platto*.

COLE, C. J. The trial court submitted to the jury the question whether *James Begg*, the father, or James Begg, the son, was the grantee in the special guardian's deed dated January 6, 1866, and the jury in effect found that the son was the grantee. The learned counsel for the plaintiff insists that there is not a *scintilla* of proof to sustain that finding: therefore the circuit court should have granted the the motion to set aside the verdict on the ground that it was wholly unsupported by the evidence. If this position of counsel is sustained by the record, then surely the verdict should not stand. But we think counsel is mistaken in saying that there is no proof in the case which supports the verdict. On the contrary, it seems to us there are many facts and circumstances appearing in the evidence which sustain the finding of the jury.

This is not a question as to the preponderance of testimony, nor even whether we would have reached the same conclusion upon it that the jury did, but whether the verdict is so clearly against the weight of testimony and the probabilities of the transaction that a court would be justified in setting it aside. Now, it is undeniable that the son gave to the special guardian his notes and a mortgage on

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the entire tract for the consideration named in this deed. That certainly is one circumstance which fairly tends to support the conclusion that the son was the grantee in that conveyance. Again, the son went into possession of the entire tract, cultivated and improved it, paid the taxes upon it, and treated it as his own property for several years. In the report of sale made by the special guardian to the probate court such guardian stated that he had entered into an agreement with James Begg, Jr., subject to the approval of that court, to sell the interest of his ward, Charles M. Halsey, to him upon the conditions named. It is also indisputable that the father presented a claim against his son's estate containing an item for $1,300, cash paid to the special guardian, January 6, 1866, at the request of his son.

These facts, and some others of less cogency tending to show that the son was the grantee in the deed, were before the jury for their consideration. It is certainly true that there was much countervailing testimony, but it is impossible to say that this evidence so strongly preponderates against the verdict as to warrant the court in disturbing it. Fair and reasonable men, considering and weighing all the evidence given on the trial, might arrive at different conclusions upon it. It may be true, as claimed by counsel, that the father paid most of the consideration for the entire tract of land. This fact is not entitled to any controlling weight in determining the question as to who was the grantee of the guardian's deed. The father may have intended this money thus paid as a gift to his son at the time. The evidence does not show that the father seriously asserted any claim to any portion of this land until after the death of his son. It is a fair inference from the testimony that he was willing to aid his son in procuring a farm, and this friendly disposition on his part affords a reasonable explanation of his conduct in consenting that the title should be conveyed to his son by this guardian's deed. At all events

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the jury have found, upon sufficient evidence, that the son was the grantee in that deed, and this conclusion disposes of the case, even though the father paid most of the purchase money by taking up his son's notes.

Without dwelling longer upon the testimony, we think the judgment of the circuit court must be affirmed.

By the Court.—It is so ordered.

SUMNER and another, Respondents, vs. NEWTON, Trustee, Appellant.

September 24 — October 13, 1885.

Wills: Termination of trust for maintenance during life of beneficiary: Release: Jurisdiction of county court.

If the county court can lawfully terminate a testamentary trust for the support and maintenance of a person during life, while such beneficiary is still living (a question not determined), such a trust should not be so terminated without a full hearing in some proceeding to which all persons interested in the trust fund are parties, nor without security being given that the beneficiary shall never want for maintenance, if the trust fund would have been sufficient therefor. If a release executed by the beneficiary is the basis of the application for the termination of the trust, the court should investigate the circumstances under which the release was executed, the capacity of the beneficiary, and whether the execution of the release was a judicious and discreet act. Whether any of the foregoing requirements might be dispensed with if the trustee consented to the termination of the trust, not determined.

APPEAL from the Circuit Court for *Dodge* County.

Maranda Goodal died November 17, 1871, leaving a will in and by which she devised and bequeathed all her estate, real and personal, to the appellant, *Thomas L. Newton, in trust*, to pay her debts; to erect a monument to her deceased husband; to pay certain legacies; to support and maintain her brother, Cyprian Chandler, and his daughter

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Mary G. Chandler, during their natural lives, or the life of either of them; and to pay over the residue of the estate remaining in his hands, one half thereof on the death of either Cyprian or Mary, and the remaining half on the death of the other, to the petitioners, *Sarah Sumner* and *Harriett Wellington*, who are also daughters of said Cyprian. *Newton* is also named as executor, and the will confers upon him full power to sell the property so devised and bequeathed to him in trust, whether real or personal; to convert the same into money; to invest the proceeds; and to change such investment in his discretion. The will was duly admitted to probate by the Dodge county court.

In July, 1872, Mary G. Chandler intermarried with one Fox, and they reside in the state of Connecticut. Her husband has maintained her since their marriage, and is apparently of sufficient ability to continue to do so. Cyprian Chandler died in February, 1884. The trusts created by the will have all been executed except that in favor of Mary, now Mrs. Fox. The proceeds of the estate now in the hands of *Newton* as a trust fund is $2,460.21, as alleged by the petitioners and admitted by the trustee.

The manner in which the trust in favor of Cyprian and Mary should be executed is thus directed in the will: "The said trustee or trustees for the time being of my said will and estate are to support said Cyprian Chandler and Mary G. Chandler generously, and not niggardly, and in a manner suitable to their condition in life, giving them that kind care and attention which their dependent condition demands; and procuring them decent homes in good respectable families, where they will receive kind treatment, and, if proper and feasible, and not hurtful or too expensive, in such place or places as they may prefer; furnishing them with suitable and becoming clothing, with such moneys as they may wish, in moderate sums, for pocket money, unless it shall appear that it is used, or to be used, in a manner

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hurtful or not beneficial to said *cestuis que trust.* I authorize my trustee or trustees for the time being of my will and estate, in case the income of said sales or investments shall prove insufficient for any of the purposes aforesaid, to draw on the principal, but not otherwise." It is also directed therein that, after the death of one of the beneficiaries, Cyprian or Mary, and payment to the residuary legatees of one half the estate, the remainder of said investment and estate is "to be kept intact, and the income thereof used during the natural life of the survivor of said *cestuis que trust* for his or her support and maintenance during his or her natural life." The will also allows *Newton* $100 per-annum for his services in executing the trusts imposed upon him during the existence thereof. If any other trustee should be appointed, the will provides that his compensation shall be fixed by the Dodge county circuit or county court.

June 10, 1884, the residuary legatees, *Mrs. Sumner* and *Mrs. Wellington*, presented their petition to the Dodge county court, praying that *Newton* be required to file his account as trustee for settlement, and to show cause why the balance of funds of said estate in his hands should not be paid to the petitioners, and the estate closed up and settled. No claim is made that he has not properly managed the estate, but the petition is based upon the following instrument purporting to be executed by Mrs. Fox under her seal, and duly attested and acknowledged:

"Know all men by these presents, that I, Mary G. Fox, of Woodstock, in the county of Windham and state of Connecticut, formerly Mary G. Chandler, of the town of Trenton, county of Dodge, and state of Wisconsin, and one of the beneficiaries named in the will of Maranda Goodal, late of said county of Dodge, deceased, for and in consideration of the sum of one dollar, to me in hand paid, and for divers other good and valuable considerations, do, by these presents, for myself, my heirs, executors, and administrators,

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and assigns, remise, release, and disclaim all legacies, gifts, and bequests given to me or for me, and all provisions for my maintenance or support, in and by the will of the said Maranda Goodal, deceased.

"And I do, for the considerations aforesaid, release the said estate of Maranda Goodal, deceased, from all claim or liability by reason of any matter or thing in said will contained; and I further release for the said consideration *T. L. Newton*, the executor of said will, or the trustee under the same, from all claims or liability to me by reason of any provisions in said will made for my benefit, either for past, present, or future support; hereby releasing the said estate, and the said executor and trustee, and all other persons from any and all claims or liabilities, suits, actions, or causes of actions, now existing, or which may hereafter exist, by reason of any matter or thing contained in the said will of the said Maranda Goodal, deceased."

An order to account and show cause, pursuant to the prayer of the petition, was issued and served on the trustee, who filed his answer thereto, stating the amount of said estate in his hands at $2,460.21, and his readiness to pay over one half thereof to the petitioners because of the then late decease of Cyprian Chandler; but denying the power of the court to terminate the trust as to the other half during the life of Mrs. Fox.

The county court granted the petition, and directed the trustee to account and pay over to the petitioners the balance of the estate in his hands, and that upon so doing he be discharged from his said trusts.

The trustee appealed to the circuit court from all of the order except that portion which required him to file his account of the trust funds. The circuit court affirmed the order of the county court, and he now appeals to this court from the judgment of affirmance.

The cause was submitted for the appellant on the brief of

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Lander & Lander. They argued, among other things, that it is the duty of the court to uphold and enforce the will as written. *Dodge v. Williams*, 46 Wis. 70. The testatrix had the right to provide that one half of the estate should remain in the hands of the trustee until after the death of Mary, and no court has the authority to otherwise order; nor can the beneficiary, nor the trustee, destroy the trust. R. S. secs. 4030, 2133, 2135, 2089, 2091; *Douglas v. Cruger*, 80 N. Y. 15; *Cruger v. Jones*, 18 Barb. 467; *Smith v. Harrington*, 4 Allen, 569.

For the respondents there was a brief by *James J. Dick* and *Edward Elwell*, and oral argument by *Mr. Elwell*. They contended, *inter alia*, that the legatee, devisee, beneficiary, or *cestui que trust* may release her interest in the property or estate, where, as in this case, the release is made to the person having the legal estate. *Miller v. Emans*, 19 N. Y. 384, and cases cited; *Moore v. Littel*, 41 id. 66; *Wilson v. Wilson*, 32 Barb. 340. The beneficial interest which Mrs. Fox had in the estate is divested by the release. No matter what her condition may be or may become, she can claim nothing against the estate or trustee. So far as she is concerned the trust is at an end; and the statute is that when the purposes for which an express trust shall have been created shall have ceased the estate of the trustee shall also cease. R. S. sec. 2098. The release is not in contravention of the trust, because the act of release terminates the trust. It is a settled principle of equity that *cestuis que trust* may make settlements, and that the trustee is bound to comply with them, and surrender the estate. Hill on Trustees (3d Am. ed.), 863, 376; Perry on Trusts, secs. 832, 833; 3 Lead. Cas. in Eq. (3d Am. ed.), 684. Where a legatee or *cestui que trust* refuses to take under the will, the fund or sum to which he was entitled goes, in a case like this, to the persons entitled to the remainder. Schouler on Ex'rs, 489, note 1; *Walker v. Bradbury*, 15 Me. 207; *Talbot*

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v. Radnor, 3 Mylne & K. 254; *Williams v. Williams*, L. R. 8 Ch. Div. 789; 2 Story's Eq. Jur. sec. 1040.

LYON, J. If the county court, in the exercise of its equitable powers, may lawfully terminate a testamentary trust for the support and maintenance of any person during life while such beneficiary is still living, the power should be cautiously exercised, and no such trust should be thus terminated without a full hearing in some proceeding to which all persons interested in the trust fund are parties, nor without ample security being required that the beneficiary should never want for maintenance, if the trust fund would have been sufficient therefor.

It is clearly manifest from the will of Mrs. Goodal that she intended to pledge all the residue of her estate, after the other trusts created therein were executed, to the support and maintenance of Cyprian and Mary G. Chandler during their respective lives, and to place each of them beyond the reach of want while he or she survived, and while any portion of her estate should remain unexpended. It is quite immaterial that Mary has needed no assistance from the estate since her marriage, or that her husband is now entirely able and willing to support her. In the vicissitudes of human affairs she may come to want. Should such a misfortune overtake her, the intention of the testatrix was to provide a fund to which she might again resort for her maintenance.

Such provisions are frequently made by testators for weak-minded or unthrifty and improvident persons, who can easily be persuaded to release the provisions made in their favor. In such cases courts of equity will investigate closely, and hesitate long before giving full effect to such a release by terminating the trust. Indeed, they will not do so, and thus defeat the cherished purpose of the testator in

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creating the trust, without some security that the beneficiary shall not be prejudiced thereby.

Mrs. Fox is not a party to this proceeding. We have nothing from her but her unexplained release. It is quite obvious that the court did not inquire into the circumstances under which it was executed, or whether it was a prudent or imprudent act. Conclusive effect seems to have been given to it, and the trust seems to have been terminated solely because she thus consented to its termination. It was a fortunate accident, rather than a material factor in the judgment of the county court, that the husband of Mrs. Fox has been and is now willing and able to support and maintain her. It would be a most pernicious and dangerous rule to allow testamentary trusts for the support of dependent persons to be absolutely terminated upon the mere consent of the beneficiaries, without regard to their capacity or the circumstances under which such consent was obtained, and without any guaranty against future adverse conditions.

Hence, assuming the power of the county court to terminate the trust on proper proceedings, we think three material errors intervened, either of which is fatal to the judgment. These are: (1) The failure to make Mrs. Fox a party to the proceeding; (2) the failure to investigate the circumstances under which the release was executed, the capacity of Mrs. Fox, and whether or not the execution of the release was a judicious and discreet act on her part; and (3) the failure to require security for the protection of Mrs. Fox, should she hereafter become indigent.

Whether any of these requirements might be dispensed with, were the trustee consenting to the termination of the trust, is not here determined. The trustee in a certain sense represents the testatrix. He was appointed by the testatrix to execute her intentions as expressed in the will; and so long

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as he insists upon the preservation of the trust, none of the above requisites to a valid termination of the trust during the life of Mrs. Fox can lawfully be dispensed with.

It has thus far been assumed that the court, on a proper case made, may terminate this trust in favor of Mrs. Fox before her decease; and further, that it may do so without the consent and against the protest of the trustee. These are very important propositions, and we are not willing to determine either of them without further argument and investigation. The questions involved were argued to some extent by counsel, and have been somewhat considered by this court. But they are so important and far-reaching in their results that we feel justified in leaving them undetermined until they are more fully argued. Counsel are referred to Perry on Trusts, § 920, and cases cited in the notes, for adjudications bearing upon them. It is sufficient for the determination of the case before us that in any view error fatal to the judgments of the county and circuit courts has intervened.

By the Court.— The judgment of the circuit court is reversed, and the cause will be remanded with directions to reverse that portion of the judgment of the county court which directs more than one half of the trust fund to be paid to the residuary legatees, and which discharges the trustee, but without prejudice to the right of the proper parties to renew the petition that the trustee be required to pay over the balance of the estate to the present petitioners, thus terminating the trust.

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THE STATE ex rel. TAYLOR, Respondent, vs. THE BOARD OF SUPERVISORS OF THE TOWN OF DELAFIELD, Appellant.

September 25 — October 13, 1885.

Mandamus: Practice: Appeal to S. C.

1. An alternative writ issued upon petition should be the first proceeding in *mandamus* in the circuit courts.
2. Where a rule to show cause why a peremptory writ should not issue was the first proceeding, and on the hearing thereof the facts were disputed, it was error to determine such facts upon affidavits. An alternative writ should then have been issued.
3. The peremptory writ is not a mere order of the court, but is a *writ*, and must be issued under the seal of the court, tested in the name of the judge, and returnable at some certain day.
4. An appeal cannot be taken from the writ of *mandamus*, but only from the order or judgment allowing it.

APPEAL from the Circuit Court for *Waukesha* County.

Mandamus to compel the laying out and establishment of a highway. The facts upon which the decision is based are sufficiently stated in the opinion.

The cause was submitted for the appellant on briefs by *Hurlbut & Robinson*, and for the respondent on the brief of *W. H. Thomas*, attorney, and *A. Cook*, of counsel.

ORTON, J. The appeal in this case must be dismissed. The proceedings are erroneous from the beginning to the end. (1) The rule to show cause is why a peremptory writ of *mandamus* should not be granted. (2) The rule was heard as a mere motion on affidavits. (3) The so-called peremptory writ was a mere order by the court signed by the judge. (4) The appeal to this court is taken from this so-called writ of *mandamus*. These several errors will be noticed in their order.

1. The rule to show cause, as the first step in the proceedings, if any rule to show cause is granted at all, should have

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been why an *alternative* writ of *mandamus* should not be granted. The above practice may have received some sanction by at least two cases in this court. In *Att'y Gen. ex rel. Cushing v. Lum*, 2 Wis. 507, a rule to show cause was allowed only because sec. 28, ch. 126, R. S. 1849, provided that "a rule to show cause why a *mandamus* should not issue may be awarded by any judge of the circuit court in vacation, upon good cause being shown." But the court said in that case: "Either practice is allowable, although, doubtless, when the circumstances of the case will justify, the application for an alternative *mandamus* is the preferable mode." In that case the application for the writ was "based upon an alleged specific right already determined," and there were no questions of fact which could be raised. In *Schend v. St. George's G. A. Soc.* 49 Wis. 237, the first step taken was by a rule to show cause, and it appearing that there were issues of fact, it was held that it was a proper case for an alternative writ, and not for a rule to show cause for a peremptory *mandamus* in the first instance, but that an alternative writ might still be granted on such rule. Mr. Justice LYON said in the opinion that "there may be special cases in which a rule to show cause is preferable to an alternative writ; but it is believed in a great majority of cases the better practice is to apply for an alternative writ in the first instance." This case is authority that, although the rule to that effect has been abrogated, the established practice in this court is to issue the alternative writ in the first instance in all cases. *State ex rel. Lewis v. Fairchild*, 22 Wis. 110. Since the statute which authorized a rule to show cause in *Att'y Gen. ex rel. Cushing v. Lum, supra*, has been repealed, and this court in that case expressed a decided preference for an alternative writ in the first instance, and was forced into another practice alone by the statute, there seems to be no good reason why the practice in the circuit court and in this court should not be uni-

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form in such cases where the jurisdiction is precisely the same. A rule to show cause might well answer every purpose in a case where there is no controversy and no dispute as to the facts; but when on the hearing of the rule it shall appear that the facts are disputed and the right denied, then an alternative writ must issue at last, and all the cost and trouble of answering the rule by affidavits, in order to ascertain that there is a dispute, are lost and go for naught. This proceeding is held to be a civil action and subject to the same rules of pleadings as other actions. *State ex rel. G. B. & M. R. Co. v. Jennings*, 56 Wis. 113. The affidavit or petition for an alternative writ performs the office of a declaration, and the return is the primary pleading in the case, and the plea or answer traverses, or confesses and avoids, the facts set up in the return, or the return may be demurred to. *State ex rel. Cothren v. Lean*, 9 Wis. 289. The statute (ch. 148, R. S.) contemplates an alternative writ in the first instance by allowing a demurrer or answer to the return made "to the first writ of *mandamus*." Sec. 3450. "And the like proceeding shall be had thereon for the determination thereof as might have been had if the person prosecuting such writ had brought his action for a false return." There can be no *return*, in the statutory meaning of the term, to a rule to show cause or to a motion, and a rule to show cause is heard like a motion, and it is not the commencement of a suit. It may be used for the purpose of obtaining leave to commence the suit, and such was the common-law practice. The rule obtained was to show cause why an alternative writ of *mandamus* should not be granted. 3 Bl. Comm. 111; High on Extr. Leg. Rem. § 500. When the practice prevailed in New York to commence proceedings by a rule to show cause on motion, in order to have the matter reviewed in a higher court it was necessary to turn it into an alternative writ and have the facts appear on proper pleadings (*People ex rel. Mut. L.*

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Ins. Co. v. Supervisors, 20 Barb. 81; *Colonial L. Assur. Co. v. Supervisors*, 24 Barb. 166; *S. C.* 4 Abb. Pr. 84, and 13 How. Pr. 305); and error would not lie upon the granting or refusing a *mandamus* upon a mere motion, where no plea or demurrer to the return could be made. *People ex rel. Dikeman v. President of Brooklyn*, 13 Wend. 130. The learned author above cited says, in his work on Extraordinary Legal Remedies, that the usual practice in this country is to obtain an alternative writ upon petition. Sec. 502. See, also, Moses on Mandamus, 203. Such a practice is the more certain, effectual, and expeditious by an issue on pleadings, and the regular trial of issues of fact, and by the form of a civil action, and a judgment at law. It would seem that the statute above cited contemplates no other proceeding by requiring a return to be made "to the *first* writ of *mandamus*." The *first* writ must mean the alternative writ. We conclude, therefore, that, by force of the statute, and in conformity with the practice in this court, an alternative writ upon petition should be the first proceeding in the circuit courts. In this case the right to the peremptory writ was disputed, and it was a proper case for an issue of fact; therefore, by all authority, including *State ex rel. Lewis v. Fairchild*, 22 Wis. 110, and *Schend v. St. George's G. A. Soc.* 49 Wis. 237, an alternative writ was necessary before the final judgment for a peremptory writ. Wood on Mandamus, 31. There can be no objection to a motion or rule to show cause for greater caution for an alternative writ, except that such a proceeding is cumbrous, dilatory, and unnecessary.

2. The circuit court erred by trying and determining the facts upon affidavits, as we have already seen. As soon as it appeared that the facts were in controversy, an alternative writ should have been ordered upon the same relation, as directed in the above case in 49 Wis. 237.

3. The peremptory writ is essentially a *writ* of the court,

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and not a mere order signed by the judge. It must be issued as other writs are issued, under the seal of the court, tested in the name of the judge, signed by the clerk, and returnable at some certain day. R. S. sec. 2421.

4. The appeal is taken to this court from the so-called writ of *mandamus*, instead of the order or judgment of the court allowing it, if there was any. The printed case contains what is called "entry made on minutes of the clerk," etc., in which is the entry, "Peremptory writ of *mandamus* granted;" but no appeal is taken from this order, if order it can be called, and the minutes or record of the clerk, so stated in the printed case, has not been returned to this court, and is no part of its record in this case, and ought not to have been put in the printed case. It seems that the so-called writ of *mandamus* has been served upon the board of supervisors by the sheriff, and his return appears indorsed thereon. This proceeding is too irregular to be relied on, and we see no objection to the circuit court setting aside all the proceedings since the filing of the application and the counter-affidavits, and ordering an issue of an alternative writ according to the direction in *Schend v. St. George's G. A. Soc. supra*, and a similar order will be made herein.

By the Court.—The appeal is dismissed, and the cause remanded with directions to the circuit court to award an alternative writ of *mandamus* on the motion of the relator.

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TOAL, Appellant, vs. CLAPP and another, Respondents.

September 25 — October 13, 1885.

UNLAWFUL DETAINER: EXECUTION: CONSTITUTIONAL LAW. *(1) Holding over after term: Notice to quit. (2) Execution for costs. (3) Action of tort: Imprisonment for debt.*

1. Under subd. 1, sec. 3358, R. S., a tenant holding possession after the expiration of the term by lapse of time, without the permission of the landlord, may be removed without giving him notice to quit.
2. The execution for costs, "as in other actions of tort," authorized by sec. 3366, R. S., may be issued in all cases of unlawful detainer under the statute, whether there was a forcible entry or not.
3. An action for unlawful detainer is an action of tort, and the imprisonment of the defendant under an execution issued therein for the costs is not imprisonment "for debt arising out of or founded on a contract," within the meaning of sec. 16, art. I, Const. of Wis.

APPEAL from the Circuit Court for *Walworth* County. The case is thus stated by Mr. Justice CASSODAY:

"False imprisonment. It appears that, January 15, 1879, the defendant *Clapp*, being the owner and in possession of the premises and dwelling-house in question, verbally leased the same to the plaintiff, *Toal*, for the term of one month, and from month to month until the said lease should be terminated by thirty days' notice given by either party, for the monthly rental of $8. Thereupon *Toal* went into possession and paid the monthly rent as it accrued until February 24, 1883, when *Clapp* duly served upon *Toal* a written notice to the effect that she thereby terminated the agreement and lease under which he *(Toal)* held the premises, such termination to take effect March 31, 1883, which was the end of the rental month, upon which last-mentioned day she thereby required the possession to be delivered to her. *Toal* having failed to quit the premises, *Clapp*, on April 6, 1883, commenced an action against him for the unlawful detention of the premises, before Samuel Bishop, a justice of the peace in Whitewater. April 10, 1883, *Toal* appeared

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therein and answered a general denial and that he was in possession under a lease from July 1, 1882, to June 30, 1883. Said issue was thereupon tried before said justice, who, April 12, 1883, found that *Toal* was "guilty of the allegations of the complaint," being substantially as stated above, and thereupon rendered a judgment of restitution therein against *Toal* of said premises, and also rendered judgment against him therein in favor of *Clapp* for $19.77 costs therein. May 8, 1883, at the request of both the defendants, *Clapp* and *Hawes*, the justice issued an execution therein for said costs in the usual form against the body of *Toal*, and placed the same in the hands of the deputy sheriff to be served, and May 18, 1883, the deputy sheriff arrested *Toal* thereon, and conveyed him to and committed him in the county jail by virtue of said execution, and then and there closely confined and imprisoned him therein upon said execution until May 22, 1883, when he was released from close confinement therein, and allowed to go at large upon the jail limits under and by virtue of the usual bond executed therein, and so continued upon the jail limits until May 25, 1883, when he, having sued out a writ of *habeas corpus*, was taken thereon before the court commissioner issuing the same, and after hearing had thereon, he was remanded by the commissioner to the jail limits, where he remained until May 28, 1883, when he was finally released from said imprisonment by the county judge, but only upon proceedings had before said county judge for that purpose, and upon his making the oath prescribed by law for the discharge of persons in custody and imprisonment upon civil process. Said *Clapp* is a woman and said *Hawes* is her brother.

"This action is brought by *Toal* against *Clapp* and *Hawes* for false imprisonment upon a complaint alleging, in effect, the facts above stated, and also that *Hawes* had no pecuniary interest in the imprisonment of *Toal*, nor any reason therefor, other than to gratify his malice and spite, and to ad-

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vance the interest of *Mrs. Clapp* by forcing *Toal* to pay the judgment of $19.77 for costs; and that he had otherwise wrongfully assisted and counseled his said sister. Upon issue being joined and the cause called for trial, the defendants demurred to the complaint *ore tenus*, and such demurrer was sustained by the court, and, no amendment being applied for, the complaint was dismissed. From the judgment entered accordingly the plaintiff appeals."

Henry Heady, for the appellant.

For the respondents there was a brief by *Weeks & Steele*, and oral argument by *Mr. Weeks*.

CASSODAY, J. Was the plaintiff lawfully imprisoned on the judgment and execution for costs in the unlawful detainer suit? His tenancy ended and was terminated March 31, 1883, by notice given in accordance with the stipulation contained in the lease under which he had up to that time held the possession. By the same notice he was required to deliver the possession of the premises to *Mrs. Clapp* on that day. He held over and refused to so deliver. Of course such holding over was not under the lease, for that had been terminated, and the plaintiff no longer had any right under it. Such holding over, therefore, was without any authority from *Mrs. Clapp* and contrary to the notice and demand made by her upon him. Such being the condition of things, did the statutes authorize his removal without other or further notice? They expressly declare that "any tenant or lessee . . . for any part of a year . . . of any real property . . . may be removed therefrom . . . (1) when such person holds possession after the expiration of the term by lapse of time . . . and without the permission of the landlord." Sec. 3358, R. S. Here, upon the notice being given as provided by the express stipulation in the lease, the term expired by lapse of time, March 31, 1883, and the holding over thereafter was con-

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fessedly without permission of *Mrs. Clapp*. The time of the expiration of the lease was uncertain until the notice was given, when it became fixed and certain. The contract thereupon became the same, in effect, as though it had been in writing expressly providing that it should terminate or expire at the time named. Under such a lease both parties would necessarily know the day on which it would expire by lapse of time. Knowing the fact, there would be no necessity of being notified of it, and the statute quoted did not require it. Under the second and third subdivisions of the same section, where the proceeding is after default in the payment of rent, or where the tenant holds over without permission, contrary to some condition or covenant in the lease, it is otherwise, and hence in such cases a three days' notice must be given. But neither of those subdivisions have any application to a case where the expiration of the term is by lapse of time. This, as we have seen, after the notice was given, was such a case. This being so, such holding over clearly came within the language of the statutes quoted, and hence the plaintiff was liable to be removed from the premises without other or further notice.

This gave *Mrs. Clapp* the right to such judgment of restitution as the statutes authorized the justice to render in such a case. The statutes expressly declare that "if upon the trial of *any* such action the justice . . . find the defendant . . . guilty of the allegations in the complaint, the justice shall thereupon enter judgment for the plaintiff to have restitution of the premises, and tax the costs for the plaintiff . . . against such defendant. . . . Such justice shall issue execution in favor of the plaintiff for such costs *as in other actions in tort*, and also issue a writ of restitution." Sec. 3366, R. S. It is claimed that this section only applies to cases mentioned in sec. 3360, in which there have been an "unlawful or forcible *entry and*" detention. But it is the only section regulating the entry of judgment under that chapter. Besides, it expressly provides that

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"when the action is brought under the provisions of sec. 3360," the justice "shall impose a fine," etc., and then provides for the collection of such fine. From this it appears, by necessary implication, that the section does apply to a class of cases not coming under sec. 3360, and in which no fine can be imposed, for the reason that there has been no "unlawful or forcible *entry and*" detention, but only an "unlawful detainer," as in the case before us. But an "unlawful detainer" is necessarily tortious, and hence the provision that "such justice shall issue execution in favor of the plaintiff for such costs *as in other actions in tort.*" In such other actions in tort "an execution may be issued against the person of the defendant when the action in which judgment is rendered is founded on tort, or is for a penalty," etc. Sec. 3681, R. S. That such "unlawful detainer" is tortious is manifest from the fact that it subjects a party to treble damages when, as here, the action is not "brought for the nonpayment of rent." Sec. 3367, R. S. That this provision giving treble damages "is penal in its nature" there can be no question. *Chase v. Dearborn*, 23 Wis. 445. The action was for "unlawful detainer," and made tortious by express statutes, and hence the plaintiff was not "imprisoned for debt arising out of or founded on a contract, express or implied," within the meaning of sec. 16, art. I, Const. of Wis. This is so clearly established by the authorities as to require no discussion. *Howland v. Needham*, 10 Wis. 495; *In re Mowry*, 12 Wis. 53; *Cotton v. Sharpstein*, 14 Wis. 226; *In re Kindling*, 39 Wis. 60; *Baker v. State*, 54 Wis. 378; *In re Milburn*, 59 Wis. 30 *et seq.; In re Burrows*, 33 Kan. 675.

The view we have taken of the question considered renders it unnecessary to consider the others so thoroughly discussed by counsel, as they are each dependent upon the one already determined.

By the Court.—The judgment of the circuit court is affirmed.

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LEAVITT, Administratrix, etc., Respondent, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

September 25 — October 13, 1885.

Negligence — Court and jury.

Upon the evidence in this case it is *held* that the questions of the negligence of the defendant and the contributory negligence of the plaintiff's intestate, who was struck and killed by defendant's train at a highway crossing, were properly for the jury; and an order of the trial court setting aside a nonsuit previously granted, and directing a new trial, is affirmed.

APPEAL from the Circuit Court for *Walworth* County.

Action to recover damages on account of the death of the plaintiff's intestate, alleged to have been caused by the negligence of the defendant.

The evidence given on behalf of the plaintiff tended to establish the following facts: On the afternoon of November 26, 1882, the deceased was driving some cattle at a point where the defendant's track crosses the highway which runs east and west between sections 24 and 25 in the town of Clinton, Rock county. The railroad track at this point runs northwest and southeast. In some way the cattle got upon the defendant's right-of-way northwest of the crossing, and the deceased was driving them out by the cattle-guard upon the highway, when a wild freight train, running at a rapid rate of speed, approached from the southeast. When this train passed the deceased was standing in a ditch which runs along between the railroad track and an embankment formed by the dirt thrown out from the ditch. He was at a point between the cattle-guard and the traveled track of the highway, and seems to have been endeavoring to keep the cattle off from the track and out of the way of the approaching train. As the locomotive passed him some part of it struck him in the back causing injuries which resulted in his death.

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At the close of the plaintiff's evidence a nonsuit was granted. Afterwards upon the plaintiff's motion the nonsuit was set aside and a new trial granted. From the order setting aside the nonsuit and granting a new trial, the defendant appealed.

For the appellant there was a brief by *Jenkins, Winkler & Smith*, of counsel, and oral argument by *C. H. Van Alstine.*

For the respondent there was a brief by *J. V. Quarles*, of counsel, and oral argument by *Mr. Quarles* and *Mr. T. W. Spence.*

COLE, C. J. It is apparent that the learned circuit court was dissatisfied with his decision on the motion for a nonsuit. It is said the nonsuit was improperly set aside, because (1) no actionable negligence on the part of the servants of the defendant was proven on the trial; and (2) because the evidence showed that the deceased himself was guilty of negligence which contributed to the injury. In respect to these propositions, if we could say that there was not sufficient evidence to warrant a jury in finding that the servants of the defendant were guilty of negligence in the management of the train, or in any other matter, or that the evidence of carelessness on the part of the deceased was so clear and free from doubt as to justify us in deciding, as a matter of law, that he was guilty of contributory negligence,— then it would follow that the nonsuit should stand. But if there were facts and circumstances appearing in the evidence which fairly tended to show negligence on the part of the defendant, and to rebut any inference of carelessness on the part of the deceased, then both questions should be left to a jury. It has often been said, by this and other courts, that the question whether a party in a given case is chargeable with negligence is ordinarily one for a jury to decide, under proper instructions from the

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court as to what constitutes negligence. In a clear case, where the facts are undisputed or free from doubt, where only one conclusion can fairly be reached upon the evidence, the court may decide, as a matter of law, that negligence has or has not been established. "When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by a jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ." COOLEY, C. J., in *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 123.

As there must be a new trial in this case it would be improper for us to indicate more distinctly our views as to what facts the evidence tended to establish. We can only say it was not a case where the court should decide, as a matter of law, whether the deceased was guilty of negligence when he was struck by the train, or whether the defendant had not been guilty of negligence in failing to keep its cattle-guard in suitable condition, or in the management of its train when the accident happened.

In his opinion, setting aside the nonsuit, the learned circuit judge stated that his attention on the motion was directed solely to the question as to whether the deceased was justified in pursuing the course he did simply to save the cattle from injury, and he thought the effort to save property from destruction did not justify a reckless and negligent exposure of life. But the learned judge added that it was the duty of the deceased to make reasonable endeavors to save human life on the train, and that it was a proper question for the jury to determine whether, in attempting to discharge this manifest duty, the deceased was exercising due and proper care under the circumstances.

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It seems to us that the care exercised by the deceased at the time of the injury, as well as the negligence of the defendant, were questions for the jury upon all the evidence. That being so, the order setting aside the nonsuit was correct, and must be affirmed.

By the Court.—It is so ordered.

LEE, Appellant, vs. THE CITY OF RACINE, Respondent.

September 25 — October 13, 1885.

City charter: Contracts for work: Change: Validity.

Under the charter of the city of Racine (Laws of 1876, ch. 313, tit. III, sec. 5) a contractor to do work for the city cannot recover for extra work which he is directed by the city engineer to do, unless a contract therefor is countersigned by the city comptroller.

APPEAL from the Circuit Court for *Racine* County.

The parties entered into a contract in writing, duly executed, by which the plaintiff agreed to excavate the earth and put in a certain sewer in and for the defendant city, in accordance with certain plans and specifications which are made a part of the contract. The city agreed to pay him a stipulated price therefor at the times and in the manner therein mentioned. The plans and specifications call for a sewer to be laid at certain inclinations or grades, starting at the water-level of Lake Michigan, and they give the required depth of excavation therefor. It turned out that there was a mistake in the surface grade as represented therein; and for several hundred feet it required from six inches to two feet excavation more than the plans and specifications called for in order to locate the sewer-pipe at the prescribed grade.

The plaintiff made the additional excavations, and laid the sewer according to the contract. Before doing so, how-

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ever, he informed the city surveyor, who had charge of the work for the city, of the mistake, and told him that he could not do the additional work without extra charge. The surveyor replied: "I suppose so; you have got to go ahead."

The city paid the plaintiff the contract price for constructing the sewer, and $48 on account of such additional excavation, and refused to pay any more.

This action is to recover further compensation to the amount of $392 for such extra work. The above facts appearing on the trial, the court nonsuited the plaintiff, who appeals from a judgment against him for costs rendered accordingly.

For the appellant the cause was submitted on the brief of *Wyman & Roehr*. They contended that by the act of its agent, the engineer, who had abundant authority under the contract to direct the manner in which the work should be done, the city impliedly assented to the alteration of the contract in respect to the depth of the sewer, and was therefore liable. *Messenger v. Buffalo*, 21 N. Y. 196; *Hasbrouck v. Milwaukee*, 21 Wis. 237.

Samuel Ritchie, for the respondent, to the point that under its charter, the city cannot be held liable on implied contracts, cited *Dickinson v. Poughkeepsie*, 75 N. Y. 75; *Detroit v. Mich. Paving Co.* 36 Mich. 335; *Detroit v. Robinson*, 38 id. 108.

LYON, J. The charter of the city of Racine, in a section prescribing the powers and duties of the city comptroller, provides as follows: "He shall make, or cause to be made, estimates of the expenses of any work to be done by the city, . . . and countersign all contracts entered into by the city, and unless they be so countersigned they shall have no validity; and no money shall be drawn from the city treasury for work done on any contract before it was

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countersigned by him." Laws of 1876, p. 724, ch. 313, tit. III, sec. 5.

The plaintiff claims compensation for work done by him for the city under a contract, but he shows no valid contract because he fails to produce one countersigned by the comptroller. If it be claimed that the original contract (which was duly countersigned) was changed so as to include the additional excavations, then, because the alleged change increased the cost of the work, the sanction of the comptroller was necessary to the validity of the new stipulations sought to be incorporated in the contract. If the contract was for extra work outside the original contract, there is no room to doubt or question that it is essential to its validity that it be so countersigned.

Under the above provisions neither the surveyor nor any other city officer can bind the city by a contract for work, unless the contract is countersigned by the city comptroller; and the record shows no contract, so countersigned, for doing the work in question. The nonsuit was properly ordered. None of the cases cited hold otherwise, as we understand them, and, did they so hold, we could not follow them. The charter provision is imperative. It must be complied with or the city is not bound.

By the Court.—Judgment affirmed.

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THE STATE, Respondent, vs. WETTSTEIN and others, Appellants.

SAME, Respondents, vs. SAME, Appellants.

THE STATE, Respondent, vs. WETTSTEIN and another, Appellants.

September 25 — October 13, 1885.

STATUTES: MILWAUKEE MUNICIPAL COURT: BAIL: PRACTICE. *(1, 2) Grant of restricted power: Repeal by intendment of general law giving greater power: Bail for appearance from term to term. (3) Continuance: When sureties discharged: Pleading. (4) Action on recognizance, by whom to be brought. (5) Costs.*

1. Where, by the general laws, a court has other powers than those mentioned in a particular section of the statutes, which grants affirmatively a more restricted power, the general power of the court in that respect is not necessarily taken away.
2. Thus, sec. 2511, R. S., as amended by sec. 4, ch. 256, Laws of 1879, giving to the Milwaukee municipal court power to "bail over to an existing term, or to its next regular term," etc., does not take from that court its power under the general laws to take a recognizance for the attendance of a person from term to term.
3. A recognizance was given for the appearance of a person at the January term of court and from term to term thereafter, until discharged by law. In an action thereon the complaint stated that at the next (February) term the principal defendant appeared and obtained a continuance of the cause to the March term; that at the March term he failed to appear, etc. *Held* that the failure to allege that the cause was continued from the January term to the February term did not render the complaint insufficient.
4. An action upon a recognizance taken in a criminal case should be brought in the name of the state.
5. In such an action, upon overruling a demurrer to the complaint, costs may awarded against the defendants.

APPEALS from the Municipal Court of *Milwaukee* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

These actions were commenced in the municipal court of

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the county of Milwaukee against the appellants, respectively, upon three separate recognizances entered into by them for the appearance of the appellant, *Wettstein*, in said court to stand trial upon the charge of obtaining goods under false pretenses.

The recognizances upon which the actions were brought are all in the following form substantially, except as to parties:

"STATE OF WISCONSIN, MILWAUKEE COUNTY. } In Municipal Court.

THE STATE OF WISCONSIN, *against* MOSES WETTSTEIN. } No. , January Term, A. D. 1884.

"We, *Moses Wettstein*, as principal, and *Philip Carpeles* and *Bernhard Schram*, as sureties, hereby give bail in the sum of $1,000 for the appearance of said *Moses Wettstein* at the present term of the municipal court for Milwaukee county, to answer to a criminal prosecution for obtaining goods under false pretenses, and from term to term thereafter, until discharged by law.

"*Dated January 12th, A. D. 1884.*

"M. WETTSTEIN. [Seal.]
"PHILLIP CARPELES. [Seal.]
"BERNHARD SCHRAM. [Seal.]

"Approved: JULIUS MEISWINKEL, Clerk of Municipal Court."

The complaint set out the arrest of *Wettstein;* that he was brought before the judge of said municipal court, charged with the offense as mentioned in the recognizance; that such proceedings were had that the said *Wettstein* was duly held to answer such charge at the then present term of said municipal court; and the bail to be given by him for his appearance thereat, and from term to term thereafter, as provided by law, was fixed at the sum of $1,000; and thereupon the accused and the other appellants, as his sure-

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ties, entered into the recognizance in the form above set out. The complaint further alleges that the sureties justified, and the recognizance was delivered to, taken, approved, and filed by the clerk of said court; and thereupon the defendant *Wettstein* was discharged from custody, according to law.

The complaint then further alleges that at the next regular term of said court, held on the 11th day of February, 1884, said criminal action against said *Wettstein* having been duly reached in its order, the defendant was called upon to appear, and thereupon the attorney for said defendant appeared and moved that the action be adjourned until the March term of said court, which motion was allowed, and the cause was so adjourned; that at the March term of said court, and on the 11th day of March, A. D. 1884, said action of the state of Wisconsin against *Moses Wettstein* was reached in its order, and said defendant *Wettstein* was duly called to appear, but failed to appear; and thereupon, and immediately thereafter, the defendants *Philip Carpeles* and *Bernhard Schram* were duly and publicly called in open court to produce their principal, said *Moses Wettstein*, in court, but said sureties also failed to appear and produce their principal or to give excuse for his non-appearance, and thereupon said recognizance above set forth was duly and publicly declared forfeited, and thereupon the court ordered that an action be commenced against the said sureties on said recognizance; that the defendants have ever since then failed and neglected to pay the amount so forfeited by them upon said recognizance, and that by reason of the premises all the defendants have become and are still indebted to the plaintiff in the sum of $1,000 on their said obligation, and an action against them therefor has accrued in the name of the plaintiff and for the benefit of said county of Milwaukee. Wherefore the plaintiff demands judgment against the defendants for $1,000, its damages, and for the costs of this action.

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To the complaint in each case the defendants demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer in each case was overruled, and from the orders overruling the demurrers appeals were taken to this court.

The causes were submitted for the appellants on the brief of *Wallber & Schram*, and for the respondent on that of *W. C. Williams*.

For the appellants it was contended, *inter alia*, that if the accused appeared at the January term of the municipal court, and no continuance was had, the sureties were discharged. *State v. Newton*, 22 Wis. 536; *State v. Mackey*, 55 Mo. 51; *Kiser v. State*, 13 Ind. 80; *People v. Derby*, 1 Parker's Cr. Rep. 392. If the sureties produced their principal at that term they were released; or if anything was done by the prosecution, without the consent of the principal or sureties, preventing the disposition of the cause at that term, or extending the liability of the sureties over that term, the sureties are released. *Lamont v. Ward*, 36 Wis. 558. The complaint is defective in not alleging at least that the cause was continued by the court over the January term. *People v. Scott*, 67 N. Y. 585; *People v. Greene*, 5 Hill, 647; *People v. Hainer*, 1 Denio, 454; *Reese v. U. S.* 9 Wall. 13.

TAYLOR, J. Upon the hearing in this court, the learned counsel for the appellants contend that the complaints are bad (1) because it is insisted the municipal court has no power to take a recognizance in a criminal case, except from one term to another, and that a recognizance to appear from term to term is void; (2) the complaint is insufficient because it does not appear from the complaint that the criminal action was continued from the January term to the February term of said court, nor what disposition was made of the case at the January term; (3) that

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the action should have been brought in the name of the county of Milwaukee and not in the name of the state. It is also alleged as error that costs were awarded to the plaintiff on overruling the several demurrers.

The municipal court has jurisdiction of an action on a recognizance taken in said court. See R. S. sec. 2499.

We think the learned counsel is mistaken as to the power of the municipal court to take a recognizance in criminal actions pending in that court, requiring the attendance of the accused from term to term. Sec. 2499, R. S., as amended by sec. 1, ch. 256, Laws of 1879, provides that such municipal court "may have and exercise powers and jurisdiction concurrent and equal with the circuit court of Milwaukee county in all cases of crimes arising in said county." Sec. 2500, R. S., as amended by sec. 2, ch. 256, Laws of 1879, provides as follows: "The general provisions of law which may at any time be in force relative to circuit courts, and actions and proceedings therein, in cases of crimes and misdemeanors, shall relate also to said municipal court unless inapplicable." Sec. 4810, R. S., reads as follows: "Whenever any person charged with a criminal offense shall be admitted to bail for his appearance at the circuit court to answer the same, he may at his option give bail either for his appearance at the then pending or next regular term thereof, or for his appearance at such term, and from term to term thereafter until discharged by law." Sec. 4811 prescribes the forms of recognizance to be taken in such cases. The second form prescribed by this section is the one used by the municipal court in the cases at bar. Sec. 4813 declares the effect of a recognizance taken in the forms aforesaid, and reads as follows: "Bail-bonds and recognizances given or entered in the above forms, or forms of substantially the same import, shall be as valid, binding, and effectual, and as much a charge, as those given in the forms heretofore in use, and shall bind the principal and sureties

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jointly and severally as follows: "(1) If for the pending term only, for the appearance of the accused at court from day to day during such term, unless excused from such daily appearance by the court. (2) If for the next regular term only, for the appearance at court at such term on the first day thereof, and from day to day thereafter during the term, unless excused by the court from such daily appearance. (3) If for all terms, until discharged by law, for the appearance of the accused on the first day of each regular term, and from day to day thereafter during each term, unless excused by the court from such daily attendance, until discharged by law, and for like appearance at any court to which the case may be removed for trial." The last paragraph defines the effect of a recognizance taken in the form taken by the municipal court in the cases at bar. Sec. 4815, R. S., reads as follows: "The forms of recognizance and bail-bonds prescribed in the four preceding sections may be used as far as applicable in all criminal actions and proceedings in all justices' courts, police and other courts not of record, as well as in all courts of record in this state." The municipal court of the county of Milwaukee is a court of record, and also has the jurisdiction of a justice's court. See sec. 2499, as amended by sec. 1, ch. 256, Laws of 1879.

From the reading of the statutes above quoted it would seem that there ought to be no doubt as to the power of the municipal court to take a recognizance in the form taken in the cases against *Wettstein*. But the learned counsel for the appellants contend that all those provisions of law which seem so ample to confer the disputed power upon the municipal court should go for nothing, because sec. 2511, R. S., as amended by sec. 4, ch. 256, Laws of 1879, has the following language: "Said municipal court shall have power to commit or bail over to an existing term, or to its next regular term, such persons as on examination are found

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to be indictable or subject to information, and such witnesses as may be necessary." It is sometimes held that a statute which grants power to a court or officer is construed as prohibiting the exercise of any other power than that granted, but we are of the opinion that in cases of this kind, where, by the general laws of the state, a court has other powers than those mentioned in a particular section of the statutes which grants affirmatively a more restricted power, the general power of the court in regard to that matter is not necessarily taken away. We cannot think that the legislature intended to take away from the municipal court of Milwaukee—a court having as extensive a criminal jurisdiction as any in the state—a power in regard to letting its prisoners to bail, which is conferred upon every justice of the peace, police justice, and every other magistrate who has the power to take the examination of persons accused of crime, by the enactment of this paragraph of sec. 2511, R. S. This affirmative act can only repeal the other acts conferring the greater power upon the court by intendment; there is no express repeal, and we think it should not be held in a case of this kind that there is a repeal by intendment.

The second objection to the complaint, that it does not affirmatively show that the action was continued from the present January term, at which the recognizance required the appearance of the accused, to the next regular term in February, does not render the complaint insufficient. The condition of the recognizance as defined by the statute above quoted is that the defendant shall appear on the first day of the January term, and on the first day of each regular term thereafter, and from day to day during such terms, unless excused by the court from such daily attendance, until discharged by law. There is nothing in the complaint which shows that the defendants have been discharged by law from their recognizance, and the complaint does

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show that the defendant recognized the power of the court to require his appearance at the February term, and he did then appear and continue the case until the March term, when he failed to appear, and so forfeited his recognizance.

We need not determine what the effect would be upon the recognizance had the defendant appeared from day to day, during the January term of the court, ready to answer to any indictment or information to be filed against him, and the court had neglected to call him to answer the same, or to continue the case, as there is nothing in the case showing that the defendant did so appear, nor is there anything in the case showing that any information was filed against him during the January term. Had the accused failed to give a recognizance for his appearance at the present term of the court, and had he been imprisoned on such failure to give bail, he would not have been entitled to a discharge from such imprisonment until the end of the February term of said court. See sec. 4638, R. S. We do not see, therefore, how his recognizance could have been discharged, had he appeared at said court during the January term, if no information had been filed against him during such term. Had the information been filed, and the accused had appeared and pleaded thereto, the court would have had the power to continue the case, against his will, until the next term, and such continuance would not have discharged the sureties on the recognizance.

The objection that the action upon the recognizance should be brought in the name of the county is clearly untenable. The recognizance is essentially an acknowledgment, on the part of those who enter into the acknowledgment, of a present indebtedness to the state of Wisconsin, with a condition that the indebtedness shall be deemed satisfied if the accused shall appear and stand trial for the crime with which he stands charged. Sec. 4795, R. S., declares that every recognizance taken in a criminal action "shall be

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mere evidence of debt." Evidence of debt due to whom? Evidently to the state, to which the accused and his sureties acknowledge their indebtedness when they enter into their recognizance. Sec. 4806, R. S., clearly indicates that all actions upon recognizances taken in criminal prosecutions shall be brought in the name of the state. This section reads as follows:

"When any action is brought *in the name of the state of Wisconsin* against a principal or surety in any recognizance entered into either by a party or a witness in any criminal prosecution, and the penalty of such recognizance shall be adjudged forfeited, the court may, on application of any party defendant, remit any part or the whole of such penalty, and may render *judgment thereon for the state*, according to the circumstances of the case and the situation of the party, and upon such terms and conditions as to such court shall seem just and reasonable."

Sec. 4807, R. S., provides that the action on the recognizance maintained in the preceding section shall not be defeated by any neglect or omission to record the default of the parties, or by reason of any defect in the form of the recognizance, if it sufficiently appears from the tenor thereof at what court the party or witness is bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take the same. Secs. 4795, 4806, 4807, R. S. 1878, have been the law of this state from the commencement. See sec. 19, ch. 102, and secs. 30, 31, ch. 145, R. S. 1849; sec. 40, ch. 132, and secs. 31, 32, ch. 176, R. S. 1858. The law of the territory was the same. See Laws of 1839, p. 228, sec. 18, and p. 373, secs. 30, 31. It has been the uniform practice from territorial times down to the present to bring all actions upon such recognizances in the name of the state. See *State v. Newton*, 22 Wis. 536; *State v. Homey*, 44 Wis. 615; *State ex rel. Guenther v. Miles*, 52 Wis. 488.

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The provision of the Code which declares that every action shall be brought in the name of the party in interest has not changed the rule, as the case comes within the exceptions to the rule stated in sec. 2607, R. S., which authorizes a trustee of an express trust, or a person expressly authorized by statute, to sue without joining with him the person for whose benefit the action is brought, and "a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." This court decided that the money recovered on a forfeited recognizance belongs to the county in which the party was held to stand trial, and not to the state. See *State ex rel. Guenther v. Miles*, 52 Wis. 488. And, as the law requires the recognizance to be taken in the name of the state, though for the benefit of the county, the action may be brought in the name of the state, and we think must be so brought.

This being a civil action for the recovery of a debt, we see no objection to charging the defendants with the costs of the demurrer.

We think the demurrers to the complaints in the several actions were properly overruled.

By the Court.—The order of the municipal court overruling the demurrer in each case is affirmed, and the cases are remanded for further proceedings.

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THE BOARD OF SUPERVISORS OF MILWAUKEE COUNTY, Respondent, vs. PABST and others, Appellants.

September 25 — October 13, 1885.

PRACTICE: APPEAL TO S. C. *(1) When time for appeal begins to run. (2, 3) Extension of time to file and settle exceptions: Discretion: County board a party. (4) "Grounds" for extension. (5) Time for serving amendments to bill of exceptions.*

1. Until the judgment is actually rendered and entered and the costs are taxed and inserted therein, the time within which an appeal may be taken does not begin to run.
2. Under sec. 2831, R. S., the trial court may allow exceptions to the findings to be filed and the bill of exceptions to be settled after the time limited therefor has expired.
3. An order allowing exceptions to the findings to be filed and the bill of exceptions to be settled after the expiration of the time limited, by a county board, plaintiff, on the grounds of a misunderstanding and of forgetfulness and sickness on the part of the district attorney, is *held* not an abuse of discretion.
4. The "grounds" shown by the affidavit upon which the time for taking any proceeding may, before its expiration, be enlarged (sec. 2831, R. S.), are *good* grounds, and the term is substantially equivalent to the "good cause shown" upon which the court may, after the expiration of the time, allow the proceeding to be taken.
5. An order to show cause why the service of a bill of exceptions should not be allowed after the expiration of the time limited, required the proposed bill to be served therewith, and it was so served as early as May 22. On June 6, it was ordered that such service of the bill of exceptions be declared sufficient service, and that the opposite party have until June 13 to serve amendments, and that the bill of exceptions be settled June 15. *Held* that the statutory time for serving amendments (ten days — sec. 2874, R. S.) was not shortened by such order.

APPEAL from the Circuit Court for *Milwaukee* County.

Action upon the special bond given by Edward Ehlers, as treasurer of Milwaukee county, for the safe keeping and disbursement of moneys in his hands belonging to the "Court House Fund," created pursuant to ch. 400, P. & L. Laws of 1871. The defendants had judgment. The subse-

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quent proceedings are stated in the opinion. The order or rule to show cause, dated May 21, 1885, was granted upon the affidavits of John M. Clarke, district attorney of the county from January 1, 1883, to January 1, 1885, of W. C. Williams, district attorney during the year 1882 and since January 1, 1885, and upon other affidavits and the papers in the case.

For the appellants there was a brief by *Cotzhausen, Sylvester, Scheiber & Sloan*, and oral argument by *Mr. Sloan.* Upon the point that it was an abuse of discretion to allow the exceptions to be filed and the bill of exceptions to be settled as was done in this case, they contended that, under the language of sec. 2831, R. S., a stronger and better reason for the enlargement of the time must be shown if the time has already expired than if it has not; that the negligence and laches in this case on the part of both plaintiff and its attorneys were flagrant; and that forgetfulness is no excuse. *Ball v. Mander*, 19 How. Pr. 468; *Beebe v. Roberts*, 3 E. D. Smith, 194.

W. C. Williams, for the respondent.

Orton, J. Judgment in this case was entered and docketed in favor of the appellants, the defendants in the circuit court, and against the respondent, the plaintiff in said court, and notice thereof served on the 15th day of June, 1883, but was so entered as of the 5th day of October, 1882. The cause had been tried, and was finally decided on the 7th day of May, 1883, and the findings of fact and conclusions of law were filed on that day, and judgment was entered by the clerk on the same and docketed, as aforesaid, on the 15th day of June, 1883. The notice of the entry of said judgment served upon the district attorney states that the judgment was entered on the 5th day of October, 1882, and docketed June 15, 1883. An appeal was taken to this court from said judgment, June 15, 1885. The exceptions on the

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trial were noted by the reporter according to a rule and the practice of said court when objections were sustained or overruled, but no formal exceptions were taken by counsel otherwise, and no exceptions were filed to the findings and conclusions of law. On the 21st day of May, 1885, a rule was obtained by the plaintiff and respondent, returnable on the 23d day of the same month, that the defendants and appellants show cause why the time of filing exceptions to the findings and conclusions of law should not be extended so as to include the date of the hearing and decision of the rule, and why the exceptions to the findings and conclusions of law served with the rule should not be ordered filed, and why the time for serving a bill of exceptions should not be extended to include the time of the hearing and disposition of the rule, and why the bill of exceptions served at the time and with the rule should not be settled and signed, and such service declared a sufficient service thereof, and be ordered filed as the bill of exceptions in the cause. This rule was ordered served at least one day before the hearing thereof. The rule having been heard on affidavits showing excusable delay, by inadvertence, misapprehension, and sickness, an order was made on the 6th day of June, 1885, that the time for filing said exceptions be extended so as to include the 10th day of June, 1885, and that the exceptions so served with the rule be filed, and that the time of serving the bill of exceptions be extended so as to include said day, and that the service of the bill of exceptions with the rule, as aforesaid, be declared sufficient service, and that the defendants have until the 13th of June, 1885, to serve amendments thereto, and that the bill of exceptions be settled and signed on the 15th day of June, 1885. From this order the defendants have appealed to this court.

The objections thereto urged in this court are: (1) That the appeal from the judgment in the cause was not taken within the time prescribed by law. The judgment was act-

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ually rendered, and entered so as to allow an appeal therefrom on the 15th day of June, 1883. The notice of the entry of such judgment served on the district attorney erroneously states that it was so entered on the 5th day of October, 1882. What effect the rendition of the judgment on the 15th day of June, 1883, *as of* the 5th day of October, 1882, may have upon the rights of the parties or any one else, if any, it is not necessary to inquire; for it is certain that there was no judgment to appeal from until it was actually rendered and entered upon the findings on the 15th day of June, 1883, and the costs taxed and inserted therein. *Bonesteel v. Bonesteel*, 30 Wis. 151; *Cord v. Southwell*, 15 Wis. 211; *Smith v. Hart*, 44 Wis. 230; *Andrews v. Welch*, 47 Wis. 132; *Haseltine v. Simpson*, 61 Wis. 427. The appeal and the time of signing the bill of exceptions were within the two years prescribed by the statute.

The second objection is that the court could not extend the time of filing the exceptions. The statute (sec. 2831, R. S.) authorizing the court on motion and good cause shown, in discretion and upon terms, to allow any proceeding to be taken after the time limited by the statute, has but one exception, and that is for an appeal. Exceptions to the findings may therefore be allowed to be filed after the time fixed therefor by the statute. *Ottillie v. Waechter*, 33 Wis. 252; *Wisconsin R. Imp. Co. v. Lyons*, 30 Wis. 61. So a bill of exceptions may be allowed to be settled after the time has expired. *Kelly v. Fond du Lac*, 29 Wis. 439; *Pellage v. Pellage*, 32 Wis. 136; *Wood v. Blythe*, 42 Wis. 300.

The third objection is that the circuit court abused its discretion in so allowing the exceptions to be filed and the bill of exceptions to be settled after the time had expired. There never was any notice of the actual entry or rendition of the judgment on the 15th day of June, 1883, but only of the rendition of the judgment on the 5th day of October, 1882, and of the docketing of said judgment on the 15th

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day of June, 1883, so that there was no notice of the rendition of the judgment from which an appeal could be taken. This defect in the notice appears to have been disregarded on the argument, and therefore, perhaps, it ought not to be considered. But the default is of the board of supervisors, a public body acting for the county, which ought not to be bound or prejudiced except by strictness of legal procedure. The district attorney had evidently forgotten the service upon him of such notice, such as it was, and there is no doubt that there was a misunderstanding between him and the board of supervisors as to the taking of an appeal. At all events, there is a dispute about it, and if the district attorney was in proper time directed to take an appeal by the board, and by his inadvertence or forgetfulness he failed to do so, the county ought not now to lose the benefit of its appeal by his failure to file exceptions and have a bill of exceptions settled in proper time, if it can be relieved without prejudice or injury to the rights of the defendants. The laches of the present district attorney is sufficiently excused by his sickness, physical disability, and necessary absence. We cannot say that the circuit court abused its discretion in making the order. *Cleveland v. Hopkins*, 55 Wis. 387; *Cleveland v. Burnham*, 55 Wis. 598; *Schobacher v. Germantown F. M. Ins. Co.* 59 Wis. 86.

The difference in the phraseology in the first and subsequent part of the above section of the statute is not material. "Showing grounds therefor" and "good cause shown" must mean the same. No grounds, therefore, are shown for an enlargement of the time in any case, unless they are adequate, good, and sufficient in the judgment and discretion of the court, and they both mean good cause shown. There can be no difference unless the statute is so construed that the time may be enlarged before it has expired, on showing any grounds or giving any reason, good or otherwise.

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The fourth objection is made to the order because it shortens the statutory time of serving amendments to the proposed bill of exceptions. The order in terms gives from the 6th day of June to the 13th day of June, 1885, to serve such amendments. But the proposed bill of exceptions was ordered to be served with the rule to show cause, and was presumably served as early as the day before the hearing of said rule, on the 23d day of May. "The party desiring to settle a bill of exceptions must prepare the same as proposed by him and serve a copy thereof on the adverse party. *Within ten days thereafter*, the adverse party may prepare and serve amendments thereto." R. S. sec. 2874. According to the statute, the ten days from the service of a copy of said proposed bill within which amendments might be served thereto had already expired when, by the order, the time was enlarged to the 13th day of June. The defendants accepted the terms of the order and served amendments within the time allowed. The time was enlarged rather than shortened.

We think that the circuit court had power to make the order appealed from, and that it was made in the exercise of a sound and reasonable discretion, and that the objections urged against it are not tenable.

By the Court.—The order of the circuit court is affirmed.

BRACHMAN, Appellant, vs. KUEHNMUENCH, Respondent

September 26 — October 13, 1885.

Striking matter from pleading: Immaterial error.

1. If, after matter is stricken from a pleading, all evidence admissible under the original pleading can still be introduced, the error, if any, in striking out such matter will not work a reversal of the order.

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2. Motions to strike out matter from pleadings should be discouraged except where the retention of such matter would affect the substantial rights of the adverse party, or where the matter is scandalous.

APPEAL from the Circuit Court for *Milwaukee* County.

The case is thus stated by Mr. Justice CASSODAY:

"The complaint, after the title of the cause, was as follows:

"'The above-named plaintiff, by M. N. Lando, her attorney, respectfully shows to this court that the plaintiff, during all the times hereinafter mentioned and prior thereto, was and now is a married woman, to wit, the wife of one Bernhard Brachman; [that the plaintiff and her husband, the said Bernhard Brachman, occupied as their home and dwelling the premises known as No. 380 Fourth street in said city of Milwaukee, which premises were rented by the husband of said plaintiff from the above-named defendant, *Jacob Kuehmuench*, for a monthly rent of fourteen dollars; that the husband of this plaintiff is a traveling salesman, and is a large part of the time absent from the city of Milwaukee aforesaid;] that the above-named defendant, *Jacob Kuehnmuench*, on the 11th day of November, 1884, while this plaintiff was alone in her said house, unlawfully, forcibly, and wrongfully broke and entered the dwelling-house so occupied by said plaintiff and her said husband, and then and there used loud, boisterous, and insulting language towards this plaintiff, and with force and great noise pounded with his fist upon the table, and threatened to strike this plaintiff, who was just then convalescing from a severe illness, rendering her more sick thereby, to her damage of one thousand dollars.

"'For a further and separate cause of action this plaintiff shows [that she is now and has been during all the times hereinafter mentioned, a married woman, namely, the wife of one Bernhard Brachman;] that [as such] she [and her

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husband] at the time hereinafter mentioned, occupied and were in the lawful possession of certain premises as their dwelling and home known as No. 380 Fourth street, up stairs, in the said city of Milwaukee; [that the husband of this plaintiff rented said premises from the said defendant for a monthly rent of fourteen dollars;] that on the 11th day of November, 1884, while this plaintiff stepped out from said dwelling and premises, the above-named defendant unlawfully, wrongfully, and forcibly took possession of said premises so occupied by this plaintiff [and her said husband] as their dwelling, and locked the doors thereof, and refused to admit this plaintiff into said dwelling, and kept her out of the possession thereof from that time to the present day; that this plaintiff had all her household furniture, clothes, and other utensils, beds and bedding in said premises; that in consequence of the wrongful acts of said defendant she was prevented to make use of her household utensils, and had to seek shelter, refuge, board, and lodging in the house of a friend and relative; that this plaintiff was at that time convalescing from a severe illness, and in consequence of being deprived of her necessary comforts and utensils in her state of convalescence, she was rendered more sick and had a partial relapse, all to the damage of the plaintiff in the sum of one thousand dollars.

"'Wherefore, this plaintiff demands judgment against the above-named defendant for the sum of two thousand dollars, and the costs of this action.'

"The defendant moved to strike out portions of the allegations in each cause of action alleged as irrelevant and redundant, and also to make the allegations in each more definite and certain. The court made an order denying the motion in part, but granting it, with costs against the plaintiff, so far as to strike out of the complaint the portions contained between the brackets. From the order so made, and the whole thereof, the plaintiff appeals."

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For the appellant the cause was submitted on the brief of *M. N. Lando.* He contended, *inter alia*, that the practice of taking exceptions to trivial allegations and making motions to strike out an unnecessary word or phrase which does not harm in any way, ought not to be encouraged. *White v. Kidd*, 4 How. Pr. 68; *Hynds v. Griswold*, id. 69; *Clark v. Harwood*, 8 id. 470; *Essex v. N. Y. & C. R. Co.* 8 Hun, 361; *St. John v. Griffith*, 1 Abb. Pr. 39. Facts which might tend to aggravate damages may properly be stated in the complaint. *Root v. Foster*, 9 How. Pr. 37; Moak's Van Santv. Pl. (3d ed.), 242, 243.

For the respondent there was a brief by *Cotzhausen, Sylvester, Scheiber & Sloan*, and oral argument by *Mr. Sloan.*

Cassoday, J. The first cause of action alleged seems to to be for personal injuries to the plaintiff by reason of the defendant "unlawfully, forcibly, and wrongfully" breaking and entering the dwelling-house occupied by the plaintiff and her husband, and then and there using "loud, boisterous, and insulting language" towards her while in poor health, to her damage. The second cause of action alleged seems to be for personal injuries to the plaintiff by reason of the defendant "unlawfully, wrongfully, and forcibly" taking possession of the premises so occupied by the plaintiff in her absence therefrom, and while she was in poor health, and then locking her out and keeping her therefrom. Such being the issues, there would seem to be no doubt but what the plaintiff may introduce any evidence under the complaint as it now stands that would have been relevant to such issues had nothing been stricken out of the complaint. The order, therefore, affects no substantial right of the plaintiff, and, assuming it to be erroneous, yet it should not for that reason be reversed. Sec. 2829, R. S.; *Slotemann v. Mack*, 61 Wis. 575. For the same reason it would seem, the defendant secured no substantial right by the order

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and by the section cited the trial court was authorized to disregard the alleged defect in the pleading, and had it done so it would most certainly have been justified. True, some of the matter stricken out was technically irrelevant to either of the causes of action alleged, and the balance was a mere repetition of what was retained, and hence was technically redundant, so that the court was technically authorized to strike it out, with costs, on motion. Sec. 2683, R. S. But it is manifest that, should courts grant such motions whenever there is an irrelevant or redundant expression in a pleading, their time would be occupied by little else, and the determination of controversies would be thereby greatly retarded. We make these statements to discourage such motions except where the retention of such matter would affect the substantial rights of the adverse party, or the matter sought to be stricken out is scandalous. The motion was technical, and not calculated to secure any substantial benefit, and so is the appeal. The reasons for discouraging the one are equally potent in discouraging the other.

By the Court.— The order of the circuit court is affirmed.

CRUGOM, Appellant, vs. CRUGOM, Respondent.

September 26 — October 13, 1885.

(1) Divorce: Alimony granted after judgment making no provision.
(2) Inquiry as to paternity of child.

1. The trial court has power, after a judgment of divorce has been granted, to allow alimony and to provide for the support of children, although no provision for either was made in such judgment.
2. But upon application for alimony in such a case it is not proper to inquire into the paternity of child born before the marriage, in order to charge the husband with its support.

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APPEAL from the Circuit Court for *Milwaukee* County.

In June, 1879, a judgment of divorce was granted in favor of the plaintiff husband. Such judgment contained no provision respecting alimony or the support of children. In November, 1884, the defendant presented a petition praying that the judgment be modified or amended so as to provide for the payment of suitable alimony to the defendant and an allowance for a child mentioned in the petition. After a hearing the court filed a decision to the effect that it had jurisdiction and authority to grant such relief, and made an order that the defendant's motion be placed upon the calendar for hearing as to the amount of alimony to be allowed, and for the purpose of taking proofs as to whether the plaintiff was the father of the child mentioned and admitted its paternity and recognized and treated it as his own after the marriage, and for the purpose of ascertaining the proper allowance for said child in case it should be found that the plaintiff was its father and recognized it as aforesaid,—"all with a view to such amendment or modification of the judgment as to the court should seem just and equitable." The order further required the payment of $25, suit money, to the defendant's attorneys. From such order the plaintiff appealed.

For the appellant there was a brief by *Chapin, Dey & Friend*, and oral argument by *Mr. Chapin*. They contended, *inter alia*, that a judgment of divorce once granted should not be disturbed. *Hopkins v. Hopkins*, 40 Wis. 463; *Bacon v. Bacon*, 34 id. 594; *Campbell v. Campbell*, 37 id. 206; *Kamp v. Kamp*, 59 N. Y. 212. If no provision is made for alimony by the decree, it is presumed that the court decided adversely to her claim, if any she made; and the decree is equally final as if such provision had been made, for the court has no power after decree of divorce to award alimony. *Kamp v. Kamp, supra.*

For the respondent there was a brief by *Cotzhausen, Syl-*

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vester, *Scheiber & Sloan*, and oral argument by *Mr. Sloan*. They cited *Campbell v. Campbell*, 37 Wis. 206; *Cook v. Cook*, 56 id. 195, op. by TAYLOR, J.; *Plaster v. Plaster*, 53 Ill. 445.

COLE, C. J. The question to be determined on this appeal is fairly stated in the brief of counsel to be whether the court has power to allow alimony to the wife and provide for the support of a child, subsequent to the judgment of divorce, where no provision was made in either case in such judgment. The appellant obtained a judgment of divorce from the bond of matrimony, on the ground of desertion, in June, 1879. The respondent was served with process, entered an appearance in the action, and answered. Judgment was finally taken against her, by default, either through some misunderstanding between her and her counsel as to when the cause would be tried, or on account of her not having means to make a defense. She states in her petition that she was not aware a divorce had been granted until the month of October, 1881, when she engaged counsel to take steps to secure for her proper alimony. But her application to the court for that purpose was not actually made until November, 1884. The important question, therefore, in the case is whether, under the circumstances, the court had power to modify its judgment and make an allowance for her support. The question is a new one in this court, and but little aid can be derived from the decisions in other states, owing to the great dissimilarity in their statutes regulating the subject of divorce and giving alimony. The question must depend for its solution upon the construction of our own statute and the decisions which have been made under it. If the judgment of divorce had allotted alimony to the wife, or provided for the support of the child, it is clear the judgment in that regard might be subsequently modified or changed. This is the express language of the statute (sec. 2369, R. S.), and such is the doctrine of our adjudications where the question has arisen.

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Helden v. Helden, 7 Wis. 296; *S. C.* 11 Wis. 554; *Bacon v. Bacon*, 34 Wis. 594; *Campbell v. Campbell*, 37 Wis. 207; *Hopkins v. Hopkins*, 40 Wis. 462; and *Cook v. Cook*, 56 Wis. 195. It is said in substance by the chief justice in *Campbell v. Campbell* that the statute proceeds upon the natural duty of the husband to support the wife after, as well as before, divorce, and that it should be liberally construed to enforce that duty. But if the suit of divorce passes to judgment before alimony is awarded, will an application for it subsequently come too late? It is difficult to see any valid reason for holding that it would, under the provisions of the statute. Mr. Justice TAYLOR, in *Cook v. Cook*, says: "The power of the court to award alimony to a wife in a divorce suit does not depend on the fact that some alimony was awarded at the time the judgment for divorce was granted. The fact that no alimony was then awarded by the court is no bar to its being afterwards awarded." 56 Wis. 220. Of course, these remarks have no reference to a case where the question of alimony was tried in the divorce cause and denied. It may well be the law, even under our statute, if that issue were once tried and decided it would be *res adjudicata* for all time. It is so held in *Kamp v. Kamp*, 59 N. Y. 212, and *Erkenbrach v. Erkenbrach*, 96 N. Y. 456. But we do not understand that the court, when it granted the divorce, adjudicated that the respondent was not entitled to alimony; so that question was left undecided. Her answer is not in the record, and we do not know what it contained. We presume it made no claim to alimony, but resisted the divorce on the merits; for the appellant says in his affidavit which was used on the hearing below, "that, from the time of the commencement of this action to the time of judgment, the petitioner never made any claim or demand upon the deponent for alimony, suit money, or other allowance for herself, nor for any allowance for any child or children whatsoever." And, as we have said, the judgment is silent as to alimony. Under

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these circumstances we feel warranted in assuming that the question of alimony has never been passed upon nor considered by the court. So the question returns, Does the application for it now made come too late?

The tendency of the decisions to which we have referred clearly is that the court has the statutory power to award alimony though the judgment for divorce, long since rendered, does not mention it. For it is conceded, if only one dollar alimony had been given in the first instance the court would have the power "to revise and alter such judgment respecting the amount," and make such judgment in regard thereto as it might have made in the original action.

It appears from the respondent's petition that she had a female child prior to her marriage with the appellant. This child, she states, was begotten by the appellant; that he recognized its paternity, and treated it in all respects as his own child after the marriage. All this is denied by the appellant. The learned circuit court ordered that the cause be placed on the calendar for a hearing as to the amount of alimony to be allowed the respondent; and for the purpose of taking proofs as to whether the appellant is the father of the child, admitted its paternity, and recognized and treated it as his own, after marriage, in order to determine the proper allowance for the support of the child in case it should be found that the appellant was its father and had recognized its paternity. This last branch of the order we deem erroneous. We think it was improper, on this application for alimony, to go into an inquiry as to the paternity of the child. The statute makes ample provision for ascertaining the paternity of a bastard, and the parties should be left to that remedy. No provision should be made on this application for the support of the child.

The last branch of the order is therefore reversed; the rest of the order is affirmed, with costs against the appellant.

By the Court.—It is so ordered.

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CONRAD, Appellant, vs. THE TRUSTEES OF THE GRAND GROVE OF THE UNITED ANCIENT ORDER OF DRUIDS, Respondents.

September 26 — October 13, 1885.

(1) Tender to agent supposing him to be principal. (2) Breach of covenant of seizin: Measure of damages. (3) Tender: Unpaid notes for purchase money. (4) Payment to evictor by grantor for grantee. (5) Voluntary conveyance after eviction.

1. A finding that a tender was made to the plaintiff is *held* to be sustained by evidence showing a tender to her husband, who was her agent, although the defendant made the tender to him supposing him to be the real party in interest.
2. In an action for breach of a covenant of seizin the measure of plaintiff's damages is the consideration paid for the land, and interest thereon from the date of payment, in lieu of mesne profits; the grantee being left to his remedy against the evictor who has established a paramount title, to obtain pay for improvements.
3. In such a case a tender of the money paid by the grantee and of the unpaid notes and mortgage given by him to secure deferred payments, is a sufficient tender.
4. After land had been conveyed by the defendant corporation to C., one W. obtained judgment establishing his title thereto as paramount. C. appealed from the judgment and gave an undertaking to pay W. the value of the use and occupation of the land pending the appeal, should the judgment be affirmed. Two of the defendant's officers, on its behalf, became sureties on such undertaking. The judgment was affirmed, and the defendant was obliged to pay W. $125 on such undertaking. *Held*, that such sum should be deducted from the amount of damages recoverable for the breach of the covenant of seizin in the deed to C.
5. The wife of a grantee of land, to whom, after his eviction, the lands have been transferred by voluntary conveyances, has no other or greater rights in an action against the grantor for the breach of the covenant of seizin, than such grantee himself would have had.

APPEAL from the Circuit Court for *Milwaukee* County.

The defendants are trustees and the governing body of a corporation known as the Grand Grove of the United Ancient Order of Druids. On May 20, 1881, as such trustees,

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and for and in behalf of such corporation, they conveyed two certain lots in the city of Milwaukee to one Heinrich Conrad, the husband of the plaintiff, with covenants of seizin, against incumbrances, and for quiet enjoyment. Conrad, the grantee, went into possession of the lots under his conveyance. The title of the corporation depended upon a conveyance of the lots to it by one Carl Witt, by a deed absolute on its face.

A few months later Witt commenced an action in the county court against the defendants, representing the corporation, and Conrad and his wife, to have his conveyance to the corporation declared a mortgage, and to redeem therefrom. He alleged that Conrad had notice of his equities when he took a conveyance of the lots. Such proceedings were had in the action that on November 29, 1881, the county court rendered judgment for Witt, adjudging his said deed to the corporation a mortgage, and his right to redeem the same by paying the amount of the mortgage debt, which was stated in the judgment. Witt having paid that amount into court for the use of the corporation, the defendants were decreed to reconvey the lots to him. The court also held that Conrad was not a *bona fide* purchaser, but that he purchased the lots with notice of Witt's equities, and decreed that the conveyance to him was null and void as against Witt, and vacated and set the same aside as to him, and ordered possession of the lots to be delivered to Witt.

March 6, 1882, two appeals were taken to this court from such judgment: one by the defendants, the other by Heinrich Conrad. The latter entered into an undertaking, with two of the principal officers of the order as sureties, conditioned to pay Witt the value of the use and occupation of the lots, pending his appeal, should the judgment be affirmed. The judgment of the county court was after-

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wards affirmed (55 Wis. 376), and the corporation paid Witt for such use and occupation $125.

March 30, 1882, Heinrich Conrad conveyed the lots to one Kloepfel, who immediately conveyed the same to the wife of Heinrich, the plaintiff. These conveyances were in the form of warranty deeds, but were merely voluntary conveyances, without any valuable consideration therefor. They were, respectively, recorded in July and August of the same year.

October 6, 1882, Heinrich Conrad and his wife were forcibly evicted from the lots by virtue of the legal process issued in Witt's action. While they occupied the same they made permanent improvements thereon of the value of from $250 to $300, the most of which were made after Witt commenced his action.

The consideration which Heinrich agreed to pay for the lots was $1,000. He paid $400 at the time of purchase, and gave six notes of $100 each, secured by mortgage on the lots, for the balance. In May, 1882, he paid one of these notes, and the accrued interest on the others, amounting in all to $142. November 22, 1882, the defendant's trustees, as aforesaid, tendered to Heinrich $464.17; that being the $542 he had paid on the purchase price of the lots, and the interest thereon to the date of the tender, less $125 paid Witt for use and occupation of the premises by Heinrich and wife pending the appeals to this court, as before mentioned. At the same time they tendered to him his unpaid notes and the mortgage given to secure them. Heinrich refused to accept the tender, and it seems to have been kept good, and the amount tendered, with the securities, were deposited in court.

The plaintiff, *Mrs. Conrad*, brought this action to recover damages for the breach of the covenants of seizin and for quiet enjoyment, contained in the conveyance of the lots

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executed by the defendants to Heinrich, her husband and grantor. The cause was tried without the intervention of a jury, and the court found substantially the facts above stated; also that the tender was made to the plaintiff as well as to her husband.

The conclusions of law which the court deduced from the above facts are as follows: "(1) That the plaintiff is entitled to no greater an amount of damages than the amount tendered prior to suit and now on deposit with the clerk of court;" and "(2) that the defendants are entitled to judgment dismissing the complaint of plaintiff on its merits, with costs of suit, which judgment shall be entered as of the term the cause was tried."

Judgment for the defendants was entered accordingly, dismissing the complaint, with costs. The plaintiff appeals from the judgment.

For the appellant there was a brief by *Johnson, Rietbrock & Halsey*, and oral argument by *Mr. Johnson.*

For the respondents there was a brief by *Cotzhausen, Sylvester, Scheiber & Sloan*, and oral argument by *Mr. Cotzhausen.*

LYON, J. The errors assigned relate only to the sufficiency of the tender. It is alleged that the same was not made to the plaintiff, but only to her husband; and, further, that the sum tendered was too little, in that money should have been tendered instead of the notes and mortgage executed by the plaintiff's husband to the defendants for part of the price of the lots in question; that the $125 paid by the defendants to Witt for use and occupation of the lots, pending the appeal in his case to this court, should not have been deducted from the sums paid them by the plaintiff's husband on account of the lots; and that the tender should have included the value of permanent improvements made upon the lots by the plaintiff and her husband. These prop-

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ositions will be considered and briefly discussed in their order.

1. The trial court found that the tender was made to the plaintiff and also to her husband. The finding that it was made to the plaintiff is challenged for the alleged reason that there is no testimony to support it. Looking into the bill of exceptions we find that the plaintiff herself testified that during the year 1882, after she took her conveyance, her husband was her agent in relation to the lots. This testimony seems to be unqualified and undisputed. We think it sufficient to support the finding thus challenged. True, when the tender was made, the defendants had no actual notice that their grantee, Heinrich Conrad, had assigned his right of action for a breach of the covenants in his deed, and supposed he remained the real party in interest; yet, inasmuch as he represented the real party in interest (the plaintiff), the tender to him operated as a tender to her, and she is bound by it.

Moreover, the testimony tends to show that the plaintiff was present when the tender was made, and neither objected thereto nor asserted her right to the damages for such breach of the covenants in her husband's deed. She testified at great length as a witness in her own behalf, but failed to deny that she was so present and knew all about the tender. We should hesitate to disturb a finding that she was so present and knew of the tender, and is estopped, by such knowledge and by her silence when she ought to have spoken, to now assert that the tender was insufficient because made to her husband alone.

2. Was it competent for the defendants to tender or offer to return the unpaid notes and mortgage of their grantee, given for a portion of the price of the lots? or were they bound to tender in cash the amount unpaid on such notes?

The consideration named in the deed to Heinrich is $1,000. Notwithstanding the receipt of that sum is ac-

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knowledged therein by the usual formula, the proof is conclusive that Heinrich paid but $500 of that sum, leaving a like sum evidenced by his notes and mortgage unpaid; so when the securities were offered to be returned to him, and the money he had paid and interest thereon was offered to him, full indemnity for all he had paid on account of the lots was thereby tendered. That is all the law requires. We should have been greatly surprised had the industrious counsel for the plaintiff found a single case to the contrary. But he has not. There would be neither equity nor reason in requiring the defendants to treat the notes of Conrad in their hands as so much cash received by them, for the purposes of a valid tender, thus compelling them to take the chances of collecting the notes when due, and after the mortgage security had entirely failed with the failure of their title to the lots.

The point is made that the tender of the securities was defective in that the notes were not canceled, nor a release of the mortgage tendered. We suppose that the delivery of the notes to the maker, with the mortgage, and the decree of the court divesting entirely the title of both the mortgagor and the mortgagee to the lots, operate as a pretty effectual cancellation of the notes and release of the mortgage. Besides, no objection was made to the tender because it was not accompanied by an offer of such cancellation and release.

3. The remaining assignments of error go to the rule of damages. They raise the question whether the defendants should be allowed the $125 they paid for the use and occupation of the lots pending the appeal of Witt's case to this court, and whether the plaintiff can recover in this action the value of the permanent improvements which she and her grantor placed upon the lots.

In an action for a breach of the covenant of seizin, the measure of plaintiff's damages is the consideration paid for

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the land, and interest thereon from the date of payment. This rule is nearly or quite universal. In an action for a breach of the covenant for quiet enjoyment, the rule is not so uniform, but in many, probably most, of the states it is the same as in actions upon the covenant of seizin. Rawle, Cov. 242, and cases cited in notes. That rule of damages was adopted in this state in the early case of *Blossom v. Knox*, 3 Pin. 262, decided in 1851. We are not aware that it has since been changed or its accuracy questioned by this court. It seems to us that the rule as thus established rests upon a sound basis, and is the better and safer rule. We must, therefore, adhere to it until changed by the legislature. See *Messer v. Oestreich*, 52 Wis. 684, and cases cited in the opinion by Mr. Justice CASSODAY; *McInnis v. Lyman*, 62 Wis. 191; *Lawton v. Howe*, 14 Wis. 241.

The rule thus established excludes both mesne profits and the value of permanent improvements as elements of damages. It gives the evicted covenantee interest on the consideration money he has paid, instead of mesne profits, and leaves him to his remedy against the evictor who has established a paramount title, to obtain pay for his improvements. Conrad sought this remedy in Witt's action, but failed to obtain pay for his improvements because he had notice of Witt's equities when he made them. 55 Wis. 376.

The payment to Witt of the $125 was not a voluntary payment. The two principal officers of the corporation represented by the defendants became security on the appeal of Heinrich Conrad for the payment thereof in case the judgment appealed should be affirmed. They did this in their own names, it is true, but for and in behalf of and at the request of the corporation, which was the real surety. The judgment was affirmed, and the defendants paid the money out of the funds of the corporation, as in justice and equity they were bound to do. We have already seen that the plaintiff's husband was primarily liable for the

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amount. Hence, in assessing his damages for the breach of his covenants, the amount should be allowed to the defendants. It was therefore properly deducted in the tender from the amount the covenantee had paid for the lots. The plaintiff stands in no better or different position than would her husband had he never made a conveyance of the lots and were he the plaintiff in the action instead of his wife.

We have no question here of the liability of the defendants for the costs and expenses of the covenantee in Witt's action. These were all paid by the defendants, as were also the mesne profits down to the time Conrad took his appeal to this court.

We conclude that none of the alleged errors are well assigned, and must therefore affirm the judgment of the circuit court.

By the Court.— Judgment affirmed.

WOOD, Appellant, vs. BOYNTON and another, Respondents.

September 26 — October 13, 1885.

SALE OF CHATTELS. *(1) Rescission. (2) Disparity between price and value: Evidence of fraud.*

1. In the absence of fraud or a mistake as to the identity of the thing sold, the vendor cannot rescind the sale and maintain an action of replevin.
2. Where the value of the thing sold was open to the investigation of both parties, and both supposed at the time that the price paid was a fair one, no disparity, however great, between such price and the real value, is to be received in an action at law as evidence of fraud.

APPEAL from the Circuit Court for *Milwaukee* County.

The case is stated in the opinion.

For the appellants there was a brief by *Johnson, Rietbrock & Halsey*, and oral argument by *Mr. Johnson:* 1. The

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gross disparity between the price paid for the diamond and its admitted value was evidence of fraud, and should have been submitted to the jury in connection with the other facts of the case. *Veazie v. Williams*, 8 How. 134, 150; *Eyre v. Potter*, 15 id. 42, 60; *Byers v. Surget*, 19 id. 303, 311; Kerr on F. & M. (2 Eng. ed.), 169, (Am. ed. 186); *Risch v. Von Lillienthal*, 34 Wis. 258; *Kuelkamp v. Hidding*, 31 id. 511; *Wright v. Wilson*, 2 Yerg. 294; *Barnet v. Spratt's Adm'r*, 4 Ired. Eq. 171; *Deaderick v. Watkins*, 8 Humph. 520; *Morriso v. Philliber*, 30 Mo. 145; *Hardeman v. Burge*, 10 Yerg. 202; *Butler v. Haskell*, 4 Desaus. 651. 2. There was a mutual, vital mistake as to the kind or species of thing sold, and this justifies a rescission. The case is precisely like the cases of "sales by description." In all such cases the courts have held that where the article varied from the description *in kind (not quality)*, the consideration failed and the contract of sale could be rescinded, even though there was neither fraud nor warranty. *Burchard v. Moore*, 3 El. & Bl. 683; *Westropp v. Solomon*, 8 C. B. 345; Story on Sales, sec. 148; *Paton v. Duncan*, 3 Carr. & P. 336; 2 Schouler on Pers. Prop. 621; Benjamin on Sales, sec. 600, and note (P). See, also, 2 Schouler on Pers. Prop. 204; Benjamin on Sales, sec. 77; *Byers v. Chapin*, 28 Ohio St. 300; *Bannerman v. White*, 10 C. B. (N. S.), 844; *S. C.* 31 L. J. C. P. 28; *Josling v. Kingsford*, 32 id. 94; *Azemar v. Casella*, L. R. 2 C. P. 431, 677; 36 L. J. C. P. 124; *Morse v. Brackett*, 98 Mass. 205.

N. S. Murphey, for the respondents:

A mutual mistake as to the quantity or quality of the thing sold is no ground for a rescission of the contract. The mistake must concern the subject matter of the contract; and care must be taken to distinguish between the subject matter and collateral facts, such as quantity, quality, etc. 1 Story's Eq. Jur. secs. 141–151; *Barr v. Gibson*, 3 Mees. & W. 390; Kerr on F. & M. (Am. ed. 1871), 399, 409, 432;

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Stebbins v. Eddy, 4 Mason, 414; *Rhode Island v. Massachusetts*, 14 Pet. 274; *Okill v. Whittaker*, 1 DeG. & Sm. 83; *Buckner v. Street*, 15 Fed. Rep. 365; *Morris Canal Co. v. Emmett*, 9 Paige, 168; *Durham v. Legard*, 34 Beav. 611; *Cooper v. Phibbs*, L. R. 2 H. of L. App. Cas. 149; *Bingham v. Bingham*, 1 Ves. Sr. 126; *Chanter v. Hopkins*, 4 Mees. & W. 399; Leake on Cont. 169; *Hawkins v. Jackson*, 2 Macn. & G. 372; *Grieveson v. Kirsopp*, 5 Beav. 287; *Hill v. Bush*, 19 Ark. 522. And the fraud or mistake must be of such a nature that the plaintiff could not, with reasonable diligence, acquire knowledge thereof when put on inquiry. *Trigg v. Reed*, 5 Humph. 529; Kerr on F. & M. 407; *Hill v. Bush*, 19 Ark. 522; *Daniel v. Mitchell*, 1 Story C. C. 172; *Warner v. Daniels*, 1 Woodb. & M. 90; *Juzan v. Toulmin*, 9 Ala. 662; *Brown v. Leach*, 107 Mass. 364; *Severence v. Whittier*, 24 Me. 120. A contract for the sale of a thing, the extent or value of which is understood to be unknown to both parties, or which is from its nature or character doubtful or uncertain, is valid and binding. *Mortimer v. Capper*, 1 Bro. C. C. 156; *Ridgway v. Sneyd*, Kay, 627; *Frank v. Frank*, 1 Ch. Cas. 84; *Beckley v. Newland*, 2 P. Wms. 182; *Cooth v. Jackson*, 6 Ves. Jr. 24; *Croome v. Lediard*, 2 Mylne & K. 251; *Sullivan v. Jacob*, 1 Molloy, 472; *Baxendale v. Seale*, 19 Beav. 601. Or, if the subject matter be an uncertain thing and the chance be known to both parties, neither can have relief because the reality has turned out to be different from what he anticipated. *Monro v. Taylor*, 3 Macn. & G. 718. The parties in this case were dealing at arms length, and the means of information and knowledge were open to both alike. Kerr on F. & M. 408, 414; *Laidlaw v. Organ*, 2 Wheat. 178; *Kintsing v. McElrath*, 5 Pa. St. 469; *Blydenburgh v. Welsh*, Baldw. 331; *Bronson v. Wiman*, 8 N. Y. 187; *Rhode Island v. Massachusetts*, 14 Pet. 274; *Fox v. Mackreth*, 2 Bro. C. C. 420; *Turner v. Harvey*, Jacob, 178; *Stettheimer v. Killip*, 75 N. Y. 282.

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TAYLOR, J. This action was brought in the circuit court for Milwaukee county to recover the possession of an uncut diamond of the alleged value of $1,000. The case was tried in the circuit court and, after hearing all the evidence in the case, the learned circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and, after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and, after judgment was entered in favor of the defendants, appealed to this court.

The defendants are partners in the jewelry business. On the trial it appeared that on and before the 28th of December, 1883, the plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterwards it was ascertained that the stone was a rough diamond, and of the value of about $700. After learning this fact the plaintiff tendered the defendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified to the circumstances attending the sale of the stone to *Mr. Samuel B. Boynton*, as follows: "The first time *Boynton* saw that stone he was talking about buying the topaz, or whatever it is, in September or October. I went into his store to get a little pin mended, and I had it in a small box,—the pin,—a small ear-ring; . . . this stone, and a broken sleeve-button were in the box. *Mr. Boynton* turned to give me a check for my pin. I thought I would ask him what the stone was, and I took it out of the box and asked him to please tell me what that was. He took it in his hand and seemed some time looking at it. I told him I had been told it was a topaz, and he said

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it might be. He says, 'I would buy this; would you sell it?' I told him I did not know but what I would. What would it be worth? And he said he did not know; he would give me a dollar and keep it as a specimen, and I told him I would not sell it; and it was certainly pretty to look at. He asked me where I found it, and I told him in Eagle. He asked about how far out, and I said right in the village, and I went out. Afterwards, and about the 28th of December, I needed money pretty badly, and thought every dollar would help, and I took it back to *Mr. Boynton* and told him I had brought back the topaz, and he says, 'Well, yes; what did I offer you for it?' and I says, 'One dollar;' and he stepped to the change drawer and gave me the dollar, and I went out."

In another part of her testimony she says: "Before I sold the stone I had no knowledge whatever that it was a diamond. I told him that I had been advised that it was probably a topaz, and he said probably it was. The stone was about the size of a canary bird's egg, nearly the shape of an egg,— worn pointed at one end; it was nearly straw color,— a little darker." She also testified that before this action was commenced she tendered the defendants $1.10, and demanded the return of the stone, which they refused. This is substantially all the evidence of what took place at and before the sale to the defendants, as testified to by the plaintiff herself. She produced no other witness on that point.

The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. *Mr. Samuel B. Boynton*, the defendant to whom the stone was sold, testified that at the time he bought this stone, he had never seen an uncut diamond; had seen cut diamonds, but they are quite different from the uncut ones; "he had no idea this was a diamond, and it never entered his brain at the time." Con-

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siderable evidence was given as to what took place after the sale and purchase, but that evidence has very little if any bearing upon the main point in the case.

This evidence clearly shows that the plaintiff sold the stone in question to the defendants, and delivered it to them in December, 1883, for a consideration of one dollar. The title to the stone passed by the sale and delivery to the defendants. How has that title been divested and again vested in the plaintiff? The contention of the learned counsel for the appellant is that the title became vested in the plaintiff by the tender to the *Boyntons* of the purchase money, with interest, and a demand of a return of the stone to her. Unless such tender and demand revested the title in the appellant, she cannot maintain her action.

The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold,— a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. This last is not in realty a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of *Mr. Boynton.* Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. *Mr. Boynton* was not an expert in uncut diamonds, and had made no examination of the stone, except to take

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it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by *Mr. Boynton.* The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain. *Kennedy v. Panama, etc., Mail Co.* L. R. 2 Q. B. 580.

There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. *Kennedy v. Panama, etc., Mail Co.* L. R. 2 Q. B. 587; *Street v. Blay*, 2 Barn. & Adol. 456; *Gompertz v. Bartlett*, 2 El. & Bl. 849; *Gurney v. Womersley*, 4 El. & Bl. 133; *Ship's Case*, 2 De G., J. & S. 544. Suppose the appellant had produced the stone, and said she had been told that it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and *Mr. Boynton* had given her $500 for it, could he have rescinded the sale if it had turned out to be a topaz or any other stone of very small value? Could *Mr. Boynton* have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or, if she had been so told, still she knew it was not a diamond. See *Street v. Blay, supra.*

It is urged, with a good deal of earnestness, on the part of the counsel for the appellant that, because it has turned

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out that the stone was immensely more valuable than the parties at the time of the sale supposed it was, such fact alone is a ground for the rescission of the sale, and that fact was evidence of fraud on the part of the vendee. Whether inadequacy of price is to be received as evidence of fraud, even in a suit in equity to avoid a sale, depends upon the facts known to the parties at the time the sale is made.

When this sale was made the value of the thing sold was open to the investigation of both parties, neither knew its intrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after-investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid? It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold. Whether that fact would have any influence in an action in equity to avoid the sale we need not consider. See *Stettheimer v. Killip*, 75 N. Y. 287; *Etting v. Bank of U. S.* 11 Wheat. 59.

We can find nothing in the evidence from which it could be justly inferred that *Mr. Boynton*, at the time he offered the plaintiff one dollar for the stone, had any knowledge of the real value of the stone, or that he entertained even a belief that the stone was a diamond. It cannot, therefore, be said that there was a suppression of knowledge on the part of the defendant as to the value of the stone which a court of equity might seize upon to avoid the sale. The following cases show that, in the absence of fraud or warranty, the value of the property sold, as compared with the price paid, is no ground for a rescission of a sale. *Wheat v. Cross*, 31 Md. 99; *Lambert v. Heath*, 15 Mees. & W. 487; *Bryant v. Pember*, 45 Vt. 487; *Kuelkamp v. Hidding*, 31 Wis. 503, 511.

However unfortunate the plaintiff may have been in sell-

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ing this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

By the Court.—The judgment of the circuit court is affirmed.

HOYT, Respondent, vs. FASS and another, imp., Appellants.

September 26 — October 13, 1885.

MILWAUKEE CITY CHARTER: EQUITY. *(1) Certificates of board of public works: Sale of delinquent lot to city. (2) Remedy of holder of one certificate when other holders refuse to join in enforcing lien.*

1. Where a lot is sold by the city treasurer of Milwaukee for the amount of certificates of the board of public works, and is bid in by the city, the certificate of such sale issued to the city will be held by it in trust for the several owners of the certificates of the board of public works.
2. Two certificates of the board of public works against a lot in Milwaukee were owned by the plaintiff and a third by the defendants, all issued in one year. The lot had been sold for the amounts due on such certificates and the certificate of the sale was held by the city. The value of the lot was less than the amount due either on the plaintiff's certificates or on that of the defendants. The defendants had acquired the legal title to the lot, and declined to make any settlement with the plaintiff or to join with him in surrendering their several certificates to the city treasurer, taking up the sale certificate, and enforcing collection thereof, as provided in the city charter. *Held*, that the plaintiff, having by himself no remedy under the charter, might maintain an equitable action to have the amounts due on the several certificates of the board of public works determined and to enforce payment thereof by a sale of the lot and a *pro rata* division of the proceeds.

APPEAL from the Circuit Court for *Milwaukee* County.

The case is thus stated by Mr. Justice CASSODAY:

"This is an appeal from an order overruling a general

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demurrer to the complaint. The complaint alleges, in effect, the incorporation of the city of Milwaukee; that in the year 1878 the lot in question, situated on the northeast corner of Hubbard and Lloyd streets, in said city, was assessed and taxed for grading, paving, planking, graveling, and gutter-paving said streets, respectively, in front of said lot during said year, and making a sewer during said year in front of said lot in said Lloyd street, and that for such works and improvements the board of public works of the city issued three several certificates at the dates and for the amounts and with the numbers, to wit: No. 28, for $23.81, issued July 1, 1878; No. 57, for $905.75, issued August 10, 1878; No. 123, for $392.57, issued November 6, 1878; and that said lot was also assessed in said year for a general city tax $1.77,—making in all $1,324.90; that January 27, 1879, the city treasurer offered said lot for sale therefor at the regular annual sale of lands for delinquent taxes in the city, and there being no bid therefor the same was thereupon struck off to the city, and thereupon a certificate of sale in the usual form was issued to the city for said sum of $1,324.90, with costs of sale; that all said taxes remained unpaid, except said general tax, which had been redeemed; that the city treasurer still holds the sale certificate; that certificate No. 123 is the joint property of the defendants *Fass* and *Niemann*, who hold and own it; that certificates Nos. 28 and 57 have become the property of the plaintiff, who holds and owns the same, and that there is due to the plaintiff thereon the sums therein named, respectively, with interest thereon at twenty-five per cent. per annum from January 27, 1879; that at the time the certificates were issued the lot was not worth to exceed $250, and was never worth to exceed $700; that after certificate No. 123 was issued to *Niemann*, he, for the benefit of himself and *Fass*, acquired the title, and became and still is the owner in fee of the lot, and that *Fass* and *Niemann* own the lot; that

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by reason of the lot being worth so much less than the certificate owned by *Fass* and *Niemann*, and also so much less than the certificates owned by the plaintiff, the latter could realize nothing, and would lose money by surrendering his certificates to the city treasurer in the usual way and paying the amount of certificate No. 123, and taking from the city a transfer to him of said sale certificate, and then enforcing the collection thereof in the usual way; that although requested so to do *Fass* and *Niemann* had, before the commencement of this action, declined to make any adjustment, settlement, or compromise of the matter with the plaintiff, or join with him and surrender their several certificates to the city treasurer and take up said sale certificate, and then enforce the collection thereof in the usual way; that after the plaintiff had obtained his several certificates he was compelled, in order to protect the same, to redeem other subsequent general, city, and county taxes to the amount, in the agregate, of $18.37; that the city holds no certificate of sale of the lot, or any part thereof, for taxes or assessments for any year previous to 1878; that the several tax sales mentioned were protected by the statutory bar given by sec. 3, ch. 309, Laws of 1880.

"The complaint prays judgment determining the amount due for principal and interest to the plaintiff on said certificates numbered 28 and 57, and to *Fass* and *Niemann* on said certificate No. 123; and that the lot, or so much as necessary, be sold by the sheriff, as upon foreclosure of a mortgage, and that the moneys arising from such sale, and properly applicable thereto, be applied in paying the costs of the action and sale, the redemption of subsequent taxes and tax liens by the plaintiff, and so much of the balance as necessary be applied in payment of the amount due on the three public works certificates, or in case of an insufficiency, then that the same be applied ratably thereon; that the sale be not made until a year after judgment, without consent of

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the parties; that the sheriff's deed be given to the purchaser upon the sale; that the parties to the action, and all persons claiming under them, be barred and foreclosed of all right, title, and equity of redemption in the land; that the sale certificate be brought into court and canceled; and for general relief."

For the appellants there was a brief by *Johnson, Rietbrock & Halsey*, and oral argument by *Mr. Johnson.*

Jenkins, Winkler & Smith, for the respondent.

CASSODAY, J. Each of the certificates issued by the board of public works was a lien upon the lot, and drew interest at the rate of twenty-five per cent. per annum from the time when the lot was sold by the city treasurer on account of such certificate liens, and was transferable by indorsement. Sec. 13, subch. 7, and sec. 14, subch. 8, ch. 184, Laws of 1874. The several contractors receiving such certificates could have no claim upon the city in any event for the work by them performed, "except from the collection of the special assessments made for the work contracted for." Sec. 21, subch. 5, ch. 184, Laws of 1874. Had the then lot-owner paid the certificates to the city treasurer he would have received the amounts so paid on such certificates, and held the same for the benefit of the owners of such certificates, and such owners respectively would have been entitled thereto on producing and surrendering such certificates to be canceled. Sec. 13, subch. 7, ch. 184, Laws of 1874. The lot-owner not having paid the certificates, and no bid having been made for the lot when offered for sale by the city, the same was properly struck off to the city, and thereupon a certificate of sale thereof was properly issued to the city in its corporate name, vesting in it the same rights at law as any other purchaser would have had; and thereupon the city treasurer was authorized to sell the certificate issued therefor for the amount of such sale and interest at twenty-

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five per cent. per annum, and to indorse and transfer such certificate to the purchaser. Sec. 29, subch. 18, ch. 184, Laws of 1874.

It is apparent from the whole theory of the charter that the certificate of sale for the amount of the board of public works' certificates so taken in the name of the city was held by it in trust for the owners of such certificates. Sec. 30, subch. 18, ch. 184, Laws of 1874. Such has been the construction put upon similar provisions in charters. *Jenks v. Racine*, 50 Wis. 321; *Finney v. Oshkosh*, 18 Wis. 209; *Fletcher v. Oshkosh*, 18 Wis. 233. The small item of $1.77, general city tax, included therein, has been paid, or the certificate redeemed to that extent, and, of course, that has no significance here. It follows from what has been said that the sale certificate of $1,324.90, less the item of general city tax mentioned, was held by the city in trust for the benefit of the several owners of the three certificates issued by the board of public works, and such owners were, of course, the *cestuis que trust*. Those certificates being transferable, as we have seen, the plaintiff properly became the owner of Nos. 28 and 57, and the defendants *Fass* and *Niemann* properly became the owners of No. 123. No other person or party, as it appears from the record, has any *equitable* interest in, or right to, the sale certificate so held in trust by the city. This is in effect confessed by the city and its treasurer by allowing the case to go by default. The substance of it all is that the plaintiff and *Fass* and *Niemann*, as the legal owners in severalty of the three certificates so issued by the board of public works, thereby became in equity co-owners in common of the sale certificate so held in trust by the city, together with the lien on the lot, and a right to a deed of the same thereby secured. The outstanding legal title to the fee of the lot was necessarily subordinate and subject to the lien of the sale certificate and the right to a deed thereon, and consequently

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subordinate and subject to the equitable rights of the plaintiff and *Fass* and *Niemann* as co-owners in common in equity of such lien and right to a deed. Were it otherwise, and the legal title had been superior to such equitable rights, then it may be that such legal title, on being acquired by *Fass* and *Niemann*, or one of them, might at once have inured to the benefit of all such co-owners in common in equity, including the plaintiff, in pursuance of well-established rules of law. *Phelan v. Boylan*, 25 Wis. 679; *Frentz v. Klotsch*, 28 Wis. 312; *Weaver v. Wible*, 64 Am. Dec. 696; Freem. Co-tenancy, § 154. Here *Fass* and *Niemann* are in effect seeking to permanently enjoy the subordinate legal title, freed and discharged from the superior equitable lien which the law has fastened upon it, and at the same time wholly escape any liability by reason of that burden. The mere fact that *Fass* and *Niemann*, or one of them, subsequently acquired the legal title to the fee of the lot did not give to them, or either of them, any higher or better equity in such lien and right to a deed than was possessed by them prior to such acquisition. The only possible effect the acquisition of such legal title to the lot could have had upon the prior equitable rights and interests therein of *Fass* and *Niemann* would be to merge such equitable rights and interests into such legal title; but that could in no way cripple or reduce the plaintiff's prior equitable rights and interests.

Assuming that the prior equitable rights and interests of *Fass* and *Niemann* were not, in equity, merged into their legal title of the lot, but kept alive, and the case stands precisely the same as it did prior to their acquisition of such legal title. The theory of the defense that because the value of the lot is less than the nominal amount of certificate No. 123 owned by *Fass* and *Niemann*, they may therefore abandon their equitable claim, and retain the legal title to the lot in defiance of the plaintiff's equitable rights,

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unless he shall first pay the nominal amount of their certificate as the price of being allowed to resort to the lot, which is of much less value, is, to say the least, very inequitable, as it would in effect wholly destroy or render valueless the plaintiff's equitable rights and interests, by compelling him in advance to pay out more than he could possibly get back in attempting to save such rights.

It is said, however, in effect, that the plaintiff must lose his equitable rights and interests, or else do so, because the city charter furnishes no other remedy. The remedies furnished by the charter are of course statutory, and hence legal remedies. As shown, the plaintiff has no adequate or beneficial remedy by himself alone under the charter. By the refusal of *Fass* and *Niemann* to co-operate with him in pursuing the remedy given by the charter the plaintiff is left without any beneficial remedy at law. This suit is in equity. It may be difficult, if not impossible, to find any reported case just like it. In equity it would seem to be very much the same as though the original lot-owner had given to the city in trust a mortgage on the lot to secure the payment of the three certificates issued by the board of public works, and then *Fass* and *Niemann*, having procured one of them and thereafter the legal title to the lot, had then refused to join with the plaintiff in enforcing the lien of such mortgage, or to allow the plaintiff to enforce the same without first paying to them the full amount of their certificate, notwithstanding such amount was considerably more than the value of the lot. Such an instrument would be quite similar to the trust deed involved in *Marvin v. Titsworth*, 10 Wis. 320. Such trust deeds are, in legal effect, mortgages, and, as such, should be enforced by a bill in equity, under which the necessary parties can be convened and their rights ascertained and adjusted. Jones, Mortg. §§ 62, 1448, 1769, and authorities there cited. The same learned author states, what every lawyer will concede, that

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"a mortgage to two or more persons to secure debts due to them severally, creates a tenancy in common and not a joint tenancy. The interest of each is not necessarily a moiety, but is in proportion to his respective claim. Each may enforce his claim under the mortgage in a form adapted to the case." Jones, Mortg. § 704, and cases there cited. Numerous cases might be cited in this court where equitable mortgages have been enforced by suit in equity. True, the sale certificate is not strictly a mortgage, but it is a lien upon the lot to secure the claims due the plaintiff and *Fass* and *Niemann* in severalty. There can be no question but that one having a lien upon property, real or personal, may maintain an action in equity to have the amount of such lien determined, and to enforce payment thereof by sale of the property or otherwise. *Boorman v. Wis. R. E. Co.* 36 Wis. 207. The case is new, but equity is flexible, adapting its salutary principles to cases as they arise, and is never wanting in the dispensation of justice. Where equitable rights and interests are jeopardized, and the letter of the law furnishes no adequate remedy, it is the business of equity to discover one. This is in harmony with the established maxims of the law: "Where there is a right there is a remedy;" "The law will always give a remedy;" "Where the law gives a right it gives a remedy to recover;" "Where a common remedy ceases the recourse must be had to an extraordinary one." Whart. Leg. Max. Nos. 383, 402, 764, 766. Here the plaintiff has a right, and is the co-owner of a superior equity. The remedy given by the charter has, by force of circumstances, ceased to be available. He has no adequate remedy, except by bill in equity like the one before us.

We think the complaint states a good cause of action, and hence that the demurrer thereto was properly overruled.

By the Court.—The order of the county court is affirmed.

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JOHNSON, Respondent, vs. WAUKESHA COUNTY, Appellant.

September 28 — October 13, 1885.

(1) Criminal law: Vagrancy: "Tramps:" Jurisdiction of J. P. (2) Conspiracy of officers to enhance fees by ignoring "tramp law." (3) Constitutional law: Unusual punishment: Jurisdiction of county courts: Juries.

1. If upon the trial of a person before a justice of the peace for vagrancy under sec. 1543, R. S., the evidence shows that the accused is probably guilty of being a "tramp" within the meaning of ch. 342, Laws of 1883, it is in the discretion of the justice whether he will proceed with the trial or bind the accused over to answer to the court having jurisdiction of the greater offense.
2. The evidence in this case is *held* insufficient to show a conspiracy between a village marshal and justices of the peace to enhance their fees by ignoring ch. 342, Laws of 1883, and proceeding against all "tramps" under the general vagrancy law. Whether such a conspiracy would constitute a defense to an action by the marshal against the county for his services in such cases, is not determined.
3. The constitutionality of ch. 342, Laws of 1883, known as the "Tramp Law," considered but not determined.

APPEAL from the Circuit Court for *Waukesha* County.

The facts are stated in the opinion. At the close of the trial in the circuit court the jury were directed to find in favor of the plaintiff. From the judgment entered upon the verdict so rendered, the defendant appealed.

For the appellant there were briefs by *W. H. Thomas*, attorney, and *Hurlbut & Robinson*, of counsel, and oral argument by *Mr. Robinson*. They contended, *inter alia*, that ch. 342, Laws of 1883, being applicable to a class of cases which is included in the general vagrancy act (sec. 1543, R. S.), supersedes that general act so far as the new and more specific provisions go. *Crane v. Reeder*, 22 Mich. 322; *Isham v. B. I. Co.* 19 Vt. 230; *Pease v. Whitney*, 5 Mass. 380; *People v. Van Nort*, 64 Barb. 205; *Union Iron Co. v. Pierce*, 4 Biss. 327; *Grant Co. v. Sels*, 5 Oreg. 243;

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Hurst v. Hawn, id. 275; *State v. Jersey City*, 40 N. J. Law, 257; *State v. Smith*, 44 Tex. 443; R. S. sec. 4972, subd. 14; R. S. 1858, ch. 191, sec. 11; *Mead v. Bagnall*, 15 Wis. 160; *Pelt v. Pelt*, 19 id. 196; *State v. Goetze*, 22 id. 365; *State v. Campbell*, 44 id. 533. Therefore a person who falls within the definition of a vagrant, but has also the attributes which make him a "tramp," must be dealt with under the law of 1883, and a justice of the peace has no jurisdiction to try such cases. If the justices had no jurisdiction the respondent had no legal right to perform the services in question and cannot recover compensation therefor. *Meagher v. County of Storey*, 5 Nev. 244; *State v. Hoboken*, 42 N. J. Law, 377; *Wragg v. Swart*, 10 Johns. 93. Respondent's claim being founded upon the several judgments of the justices, it was proper to inquire into their jurisdiction. *Bank v. Judson*, 8 N. Y. 259; *Craig v. Town of Andes*, 93 id. 405; *Kamp v. Kamp*, 59 id. 212; *Wrightman v. Karsner*, 20 Ala. 446. And such jurisdiction being questioned, the respondent, in order to maintain his action, must prove the facts giving jurisdiction.

For the respondent there was a brief by *E. W. Chafin*, attorney, and *Warham Parks*, of counsel, and oral argument by *Mr. Parks*. To the point that an officer may serve process regular on its face, whether the court has jurisdiction or not, and that in this case it was sufficient that the justice issued his warrant, that it was fair on its face, and that the respondent performed his duties as an officer under it, they cited Cooley on Torts, 549; *State v. Weed*, 21 N. H. 262; *Savacool v. Boughton*, 21 Am. Dec. 181, and note; *Davis v. Wilson*, 65 Ill. 525; *McLean v. Cook*, 23 Wis. 364; *Underwood v. Robinson*, 106 Mass. 296; *Sprague v. Burchard*, 1 Wis. 464; *Warner v. Shed*, 10 Johns. 138; *Earl v. Camp*, 16 Wend. 562; *Horton v. Hendershot*, 1 Hill, 118; *Noble v. Holmes*, 5 id. 194; *Deyo v. Van Valkenburg*, 5 id. 242; *Cornell v. Barnes*, 7 id. 35; *Van Etten v. Hurst*, 6 id.

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311. A new and affirmative statute does not repeal an existing statute upon the same subject, unless the two are clearly repugnant and cannot stand together. *Att'y Gen. ex. rel. Taylor v. Brown*, 1 Wis. 513; *Janesville v. Markoe*, 18 id. 350; *Goodrich v. Milwaukee*, 24 id. 437–8; *Snell v. Bridgewater Mfg. Co.* 24 Pick. 296; *Goddard v. Boston*, 20 id. 407–410; *Bowen v. Lease*, 5 Hill, 221; *McCartee v. Orphan Asylum*, 9 Cow. 437; *S. C.* 18 Am. Dec. 542, and note.

TAYLOR, J. The respondent presented a claim to the board of supervisors of the appellant county for services as marshal of the village of Waukesha, in said county, for serving process and other services in twenty-eight criminal actions, all of which were tried by a justice of the peace of said village or of the town of Waukesha. The charge against the defendant in each case was vagrancy, and they were all actions under sec. 1543, R. S. 1878. The claim of the respondent was disallowed by the board of supervisors, and he appealed from the order of the board disallowing the claim to the circuit court of the county of Waukesha.

Before the trial in that court the county filed an answer to the claim of the respondent. The answer sets out at considerable length that all the actions in which the services were performed, and for which services the respondent presented his claim to the board of supervisors, were actions brought under the provisions of said sec. 1543, R. S.

The answer further alleges that the complaint in each of the said cases was made by the respondent, and that at the time of making said complaints he knew that the persons proceeded against as vagrants under said sec. 1543 were not actual inhabitants of either the town or the village of Waukesha, and that they were a class of vagrants which the statute defines as "tramps;" that, being "tramps," a justice of the peace had no jurisdiction to issue a warrant

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either for their arrest or trial; and that such complaints so made by the respondent were false, and were made for the purpose of founding thereon claims for services against the county under color of law when no right to perform such services existed.

The answer further charges that when the respondent made the several complaints in said actions, he knew that the persons proceeded against were not actual inhabitants of the town or village of Waukesha; and that he fraudulently, and with intent to cheat said county out of the amount of his said several bills for services, entered said complaints under said sec. 1543, R. S., instead of under ch. 342, Laws of 1883, which chapter governed the proceedings against that class of persons to which the parties complained of belonged.

The answer futher charges an unlawful conspiracy between the respondent and the several justices of the peace whose names appear in said complaints, in substance that they would ignore entirely the provisions of ch. 342, Laws of 1883, and proceed against all vagrants found in said town or village of Waukesha as though said ch. 342, Laws of 1883, had not been enacted; that this conspiracy was entered into for the purpose of unlawfully increasing the emoluments of their respective offices; and that, in pursuance of this conspiracy, the respondent arrested all "tramps" found within said town or village under the provisions of said sec. 1543, R. S., without stating in the complaint any facts which would take the case out of the provisions of said section, and bring them within the provisions of ch. 342, Laws of 1883, and so oust the said justices of any jurisdiction to arrest or try the persons so complained of.

It is not claimed by either party upon this appeal that sec. 1543, R. S., is repealed, but on the part of the appellant it is claimed that by virtue of ch. 188, Laws of 1879, ch. 342, Laws of 1883, and ch. 333, Laws of 1885, certain per-

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sons who are vagrants within the provisions of said sec. 1543 may also be "tramps," within the law above referred to, and that when they are not only vagrants, but also "tramps," within the meaning of the statutes above cited, then the officers of the law have no authority to proceed against them as mere vagrants on complaint before a justice of the peace, but they must proceed by complaint before the officers mentioned in said chapters, and in no other way; that to proceed against them in a justice's court for the mere offense of vagrancy is an unlawful evasion of the law, and an officer who makes a complaint against such person for vagrancy before a justice of the peace, with knowledge that such vagrant is also a "tramp," as defined by the law, does an unlawful act, and ought not to be permitted to recover for his services for serving process or performing any other service in such action.

Ch. 188, Laws of 1879, was probably repealed by implication by the enactment of ch. 342, Laws of 1883; and ch. 333, Laws of 1885, simply amends sec. 4, ch. 342, Laws of 1883, by giving police justices of incorporated villages power to issue process for the arrest of "tramps," and take their examination and hold to bail or commit for trial. Sec. 1, ch. 342, Laws of 1883, makes every male person over sixteen years old, who is a vagrant within the meaning of sec. 1543, R. S., a "tramp," if he be without visible means of support and be found and arrested in any town, city, or village of this state, in which he is not at the time an actual inhabitant; or if any male vagrant, within the meaning of said sec. 1543, over sixteen years old, be found drunk and disorderly, whether he be an inhabitant or not of the town, city, or village in which he is arrested, he is also made a "tramp" by this act. On conviction of being a "tramp" the act provides that he shall be punished by imprisonment in the county jail not less than fifteen days, during which imprisonment his food and daily drink shall be bread and

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water only, or by imprisonment in the state's prison not exceeding one year; except that in counties having work-houses, commitment may be made to such work-house in the discretion of the court. All jurisdiction to issue warrants for the arrest of "tramps," or to take their examination, or hold them to bail for trial, or to try them, is taken away from the justices of the peace. The power to try such offense is conferred upon the several county courts, municipal courts, and circuit courts of the state, and by the amendment of 1885 the power to apprehend and take the examinations of such offenders is conferred upon the police justices of the incorporated villages of the state.

It will be seen by an examination of these statutes that sec. 1543, R. S., is not repealed by the act of 1883 as amended by the act of 1885, and there is no doubt, therefore, of the power of a justice of the peace to issue his warrant for the arrest of a person upon a complaint showing that he is a vagrant within the meaning of sec. 1543, R. S.; nor of his power to try the person arrested upon such complaint, and, if found guilty, to sentence him to confinement in the county jail not exceeding ninety days. See secs. 1546, 4739, 4759, R. S.

If upon such trial the evidence should show that the accused was probably guilty of being a "tramp" as well as a vagrant, the justice might, if he thought the defendant ought to be put upon his trial for the higher offense of being a "tramp," stop his proceedings and bind him over, or commit him to jail to answer to the court having jurisdiction to try him for such offense. Sec. 4678, R. S. The statute seems to leave it to the discretion of the justice whether he will proceed with the trial or stop proceedings and bind him over to answer to the court having jurisdiction of the higher offense. The question whether he will proceed with the trial or bind him over to stand trial for the higher offense is wholly addressed to the discretion of the

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justice, and I know of no way in which any other court could interfere to compel the justice to suspend the trial and hold the accused to bail for the higher offense.

The learned counsel for the county seems to have comprehended the difficulty of defending against the claim of the plaintiff, because he could not but admit that the justice had jurisdiction to try all the cases upon the complaints made before him, and that, therefore, the services of the marshal in the several cases would be legal charges against the county; and in order to avoid this conclusion, he set up, in the answer of the county, an unlawful conspiracy between the marshal and the justices of the peace of the village and town to enhance their official emoluments, and make unlawful bills for services against the county, by prosecuting the persons complained of for the lesser offense of vagrancy, in the justice's court, with full knowledge that such persons were guilty of being "tramps," under the provisions of said ch. 342, Laws of 1883, of which offense the justices had no jurisdiction. While we are not satisfied that the expense to the county would have been any less had the marshal proceeded against the accused under ch. 342, Laws of 1883, and are inclined to think the expenses in that case would have been greatly enhanced, we do not determine the question whether the county could defend against the claims of the marshal, as well as those of the justices, if it had been satisfactorily proven that there had been such a conspiracy as charged in the answer.

We think the learned circuit judge was right in stating to the jury that there was not sufficient evidence in the case to sustain such charge, and the question of a fraudulent conspiracy to accumulate unlawful bills against the county being out of the case, the respondent was entitled to recover for his services against the county.

The evidence on the trial shows that the officers in Waukesha county who were charged with the duty of enforcing

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the tramp law of 1883 had such grave doubts as to its constitutionality, and the policy of enforcing it, that they refused to act under it, and in consequence of such refusal, proceedings were commenced against the persons named in the several actions as vagrants, when it was probably known, both by the marshal and the justices who tried the cases, that at least a portion of them might have been properly tried for the higher offense of being a "tramp" instead of a common vagrant. The fact that the officers charged with the execution of the tramp law refused to execute it was a sufficient justification to the marshal and the justices to prosecute these men as vagrants, rather than permit them to escape all punishment.

In the view we have taken of this case it becomes unnecessary to determine whether the act of 1883, known as the "Tramp Law," is constitutional or not. We are constrained to say, however, that a law which makes a misdemeanor, punishable as offenses of that kind are ordinarily punished, a felony if the person guilty of the misdemeanor steps beyond the line of the town, city, or village of which he is an inhabitant, for any purpose, and inflicts punishment by imprisonment in the state prison, or, if imprisoned in the county jail, restricts his diet to bread and water only, is a harsh restriction upon the right of even a vagrant to travel beyond the limits of the place of his actual residence; and it is not certain, by any means, that the punishment by imprisonment in the county jail for fifteen days, upon a diet of bread and water alone, is not a violation of sec. 6 of article I of the constitution of this state, which prohibits the infliction of "cruel and unusual punishments." The punishment is certainly unusual, if not cruel. The act is also subject to criticism for its attempt to confer upon the several county courts of the state, which have only probate jurisdiction, the power to try persons charged with this peculiar offense; such courts having no power to summon and im-

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panel a jury for the trial of criminal actions as other courts having criminal jurisdiction, and as a consequence, in every trial of such action in the county court, the jury would necessarily be summoned by the sheriff upon his own selection from the county at large. Very much that was said by the late Chief Justice DIXON, in *Durkee v. Janesville*, 28 Wis. 464, would be equally applicable to the "tramp" law.

We do not think the constitutionality of the act is fairly before us in this case, and do not, therefore, decide that question.

By the Court.—The judgment of the circuit court is affirmed.

PATTERSON, Respondent, vs. WRIGHT, Appellant.

September 28—October 13, 1885.

(1) Deceit: Promise. (2) Promissory notes: Consideration: Fraud: Notice. (3) Setoff: Notice.

1. Representations, to be fraudulent, must relate to a present or past state of facts, and relief as for deceit cannot be obtained for non-performance of a promise looking to the future.
2. Where there is fraud in the transaction which forms the basis of consideration for a promissory note, knowledge that another note given for the same consideration is due and that interest on the notes remains unpaid, is not such notice as will affect the *bona fides* of a purchase of the former note.
3. A setoff against the payee of a note cannot be claimed against a *bona fide* purchaser thereof before due, although he had knowledge of such setoff.

APPEAL from the Circuit Court for *Milwaukee* County.

The case is stated in the opinion. The defendant appealed from a judgment in favor of the plaintiff.

Adolf Herdegen, for the appellant.

For the respondent there was a brief by *Johnson, Rietbrock & Halsey*, and oral argument by *Mr. Johnson.*

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ORTON, J. The respondent, the plaintiff in the circuit court, declared upon two promissory notes given by the defendant to one L. D. Sawyer, April 1, 1868, to become due April 1, 1878,—one for $1,500 and the other for $1,000, interest payable annually,—and it is alleged that said notes were transferred to him before due and for value. The answer denies the transfer of the notes before due, for value, and alleges in substance that in the year 1865 he, the defendant, and said Sawyer jointly owned a mill, which was insured for $6,000, and afterwards, in August, 1866, it was burned up, and the balance of the insurance money due the firm, after paying certain liens, was the sum of $2,640, which said Sawyer received and applied to his own use. The mill was rebuilt, and the defendant purchased of Sawyer his undivided one-half thereof and his interest in the partnership for $3,000, and gave him therefor the two notes in suit and another note for $500, which was overdue when the plaintiff bought the notes in suit, and Sawyer has never paid the $2,640, or any part thereof, and the defendant claims that that sum is now due, together with interest, and also alleges an offset for goods sold and delivered to said Sawyer of $500. The answer then alleges that said $2,640, or the promise to pay the same, was a part of the consideration of said notes, and that such promise was a fraudulent representation upon which the notes were obtained, and claims that said notes are subject to such equity.

On the trial the plaintiff proved that he purchased said notes before due and paid value therefor. The defendant made repeated offers to prove the original transaction between himself and said Sawyer, which were denied by the court on objection on the ground that the defendant must first show that the notes were transferred after due or for no value, which he failed to do. He then made an effort to prove the plaintiff's knowledge of such transaction, and in part by the testimony of his attorneys, which last testimony

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was ruled out as being privileged and betraying confidence. There was no evidence that the plaintiff had such knowledge. He then sought to show that the plaintiff became the owner of the $500 note also, which was overdue, as notice of the dishonor of the notes in suit. He failed to show this, but did show that the plaintiff once had said note in his hands, for collection merely.

This statement presents the whole case, and suggests the alleged errors. The jury was instructed that the plaintiff was the *bona fide* holder of the notes, and entitled to a verdict for the amount thereof, with interest. There are nuerous exceptions and many points made and argued in the brief of the learned counsel of the appellant, but the only questions of any importance are —*First*, whether the transactions alleged were fraudulent, or affected the character or inherent quality of the notes as commercial paper, and raised any equities as against the plaintiff, even if he had knowledge of them. According to the answer, reasonably construed, the defendant's claim against Sawyer was a mere money demand for one half of the $2,640, and, if anything affecting this suit, was a mere setoff. Sawyer's promise to pay it, or failure to do so, was no fraud. "The representation must relate to a *present* or *past* state of facts, and relief as for deceit cannot be obtained for the non-performance of a promise or of other statements looking to the future." Bigelow on Fraud, 11, 12, and notes; *Morrison v. Koch*, 32 Wis. 254; *Fenwick v. Grimes*, 5 Cranch, C. C. 439. This is an elementary principle, and many citations are unnecessary. Sawyer failed to perform his promise to pay the defendant his share of the $2,640, and he can enforce the demand by suit at any time, or he can make it a setoff against these notes, if they were transferred after maturity.

Second. Whether the plaintiff had knowledge of any infirmity in the notes, by having in his hands for collection the $500 note which was overdue, or by the failure to pay

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interest on the notes when due. This question is, in effect, already answered by the fact that the answer alleges no fraud which could affect the notes, but only alleges a setoff. But, conceding that there was fraud in the transaction, the fact that another note given for the same consideration was due, or that interest on the notes remained unpaid, is no such notice as to affect the *bona fides* of the plaintiff's purchase of the notes in suit. *Boss v. Hewitt*, 15 Wis. 260; *Kelley v. Whitney*, 45 Wis. 110.

Third. Whether the knowledge of the plaintiff of the existence of these setoffs when he purchased the notes made them good against the notes in his hands. Setoffs are entirely regulated by statute in actions at law, and are not *equities* which can be enforced against a *bona fide holder* of commercial paper having knowledge of them. Daniel on Neg. Inst. §§ 1435, 1437. Setoff was unknown to the common law, and is entirely a subject of statutory jurisprudence. Id. §§ 1422, 1427. By our statute (subd. 6, sec. 4258, R. S.) setoff may be allowed against such paper when transferred after it became due, clearly excluding them if transferred before due, by a familiar rule. This disposes of other questions raised on the hypothesis that the transactions out of which these notes arose were fraudulent. The exclusion of all evidence tending to show knowledge of the plaintiff of such transactions, without first proving that the notes were transferred after due or without value, was proper. The circuit court properly directed a verdict for the plaintiff.

By the Court.—The judgment of the circuit court is affirmed.

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DEW, Executor, etc., Appellant, vs. KUEHN, Respondent.

October 13 — November 3, 1885.

Wills: Devise of realty: Uncertainty as to estate given: Evidence of surrounding circumstances.

1. Sec. 2278, R. S., does not exclude, in a proper case, the consideration of surrounding circumstances in determining the intent of a testator in a devise of land. It merely changes the common-law presumption that unless words of inheritance or other words indicating a greater estate are used, a life estate only is intended to be devised.
2. A will provided as follows:

   "I hereby give and bequeath unto my beloved husband Charles F. Kuehn all my real estate situated in the town of Concord. Jefferson county and state of Wisconsin. on section eleven it being all my freehold estate whatsoever. which is situate in the town of Concord. Jefferson county and state of Wisconsin. I also give and bequeath unto my said husband. Charles F. Kuehn. all the rest residue and remainder of my personal estate chattels of whatsoever kind and nature whatsoever. to hold and keep for his natural life.

   "I further direct that immediately after it shall be divided share and share alike between," etc.

   At the time of executing the will and also at her death the personal property of the testatrix was insufficient to pay her debts. *Held*, that the limiting words "to hold and keep for his natural life" attach to the gift of the realty as well as to that of the personal property, and the husband takes but a life estate in such realty.

APPEAL from the Circuit Court for *Jefferson* County.

The case is stated in the opinion.

For the appellant there was a brief by *I. W. & G. W. Bird*, and oral argument by *Mr. G. W. Bird.* 1. The intention to give to the respondent only a life estate in the realty appears from the will itself. The limiting words are as inseparably connected with the devise as with the bequest; and the following paragraph disposes of a remainder in all the property given in the first paragraph. See *Knox v.*

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Knox, 59 Wis. 172; *Urich's Appeal*, 86 Pa. St. 386; *Metcalf v. Framingham Parish*, 128 Mass. 370; *Ferson v. Dodge*, 23 Pick. 287. Illiterate persons' wills are construed liberally as to terms used, disregarding technical construction in ascertaining meaning. *Lytle v. Beveridge*, 58 N. Y. 592. In deeds, words govern the intention; in wills, the intention governs the words. *Edwards v. Bibb*, 43 Ala. 666. A general clause following several particulars, with which it is connected by the same punctuation, qualifies the whole. 17 Barb. 25, 86. 2. The surrounding facts and circumstances still further strengthen this construction. When the testatrix made the will, she had, in fact, only the land to divide between her husband and the other beneficiaries. She intended to give *some* property to the others; and only by construing the will as devising a life estate to the husband, can that intent prevail. See *Hopkins v. Holt*, 9 Wis. 228. 3. The evidence showing testatrix's instructions to the scrivener and her declarations upon the will being read to her, establishes her intention to devise only a life estate. Where the language of the will may apply to either one of two or more objects, or to different things, testimony of the testator's instructions and declarations is admissible to show to which the testator intended it to apply. *Morgan v. Burrows*, 45 Wis. 211; *Sherwood v. Sherwood*, id. 357; *Wheeler v. Hartshorn*, 40 id. 83.

David W. Small, for the respondent, contended that under sec. 2278, R. S., the devise in this will must be construed to convey all the estate which the testator possessed in the land. "Shall," as used in that section, denotes a positive command. *Smith v. Noe*, 30 Ind. 117; *Morris v. People*, 3 Denio, 381; *Rutherford v. Greene*, 2 Wheat. 196–8; *Groves v. Slaughter*, 15 Pet. 449–500; *Ex parte Jordan*, 94 U. S. 248. See, also, *Herbert v. Reed*, 16 Ves. Jr. 481; *Evans v. Thomas*, 6 Term, 671; *Mann v. Mann*, 14 Johns. 1; *Wilson v. Eden*, 11 Beav. 289; *Arenson v. Arenson*, 3 Denio, 458;

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Jackson v. Merrill, 6 Johns. 186; *Jackson v. DeLancy*, 13 id. 537; *Evans v. Norton*, 4 Rawle, 69.

TAYLOR, J. This is an appeal from the judgment of the circuit court of Jefferson county, construing the last will and testament of Mary Ann Kuehn, deceased. The will under consideration was made February 17, 1879; the testatrix died October 10, 1881. She was the wife of the respondent. The whole will, excluding the formal parts and the clause appointing an executor, reads as follows:

"I hereby give and bequeath unto my beloved husband *Charles F. Kuehn* all my real estate situated in the town of Concord. Jefferson county and state of Wisconsin. on section eleven it being all my freehold estate whatsoever. which is situate in the town of Concord. Jefferson county and state of Wisconsin. I also give and bequeath unto my said husband. *Charles F. Kuehn.* all the rest residue and remainder of my personal estate chattels of whatsoever kind and nature whatsoever. to hold and keep for his natural life."

"I further direct that immediately after it shall be divided share and share alike between Angeline Graves Emma Graves. Elizabeth Graves and George Graves being now residents of Yorkshire England."

The only punctuation marks were dots, as indicated in the copy above, and there were but two paragraphs indicated.

The evidence also showed that on the 17th day of November, 1879, the testatrix gave her husband, the respondent, a note and mortgage for $700, to become due in three years after date, with interest at eight per cent. The mortgage was on the same real estate described in the will. It also appears that her personal property at the time of her decease was barely sufficient to pay her debts. The appraised value of the personal estate was $925.66. The ex-

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ecutor was allowed $167.06 for depreciation on sale, leaving only $758.60 to be accounted for. The debts allowed against the estate were $596.25. Of these debts $431 were allowed as debts due from the estate to the husband of the deceased, in addition to the mortgage debt of $700. Whether, in the amount allowed the husband, the interest on the $700 from its date to the time the debts were adjusted was included, does not very plainly appear. Upon a settlement of the accounts of the executor, the payment of the debts allowed against the estate and the expenses of the executor exhausted all the personal property, leaving only the real estate, subject to the mortgage for $700, to be distributed under the will. The respondent claims that the real estate belongs to him in fee, and the circuit court so held. The executor, representing the residuary devisees, insists that, under the provisions of the will, *Kuehn*, the husband, takes only a life estate in said lands, and that the residuary devisees are entitled to the remainder, subject only to the payment of the $700 mortgage thereon held and owned by the respondent.

The contention of the counsel for the respondent is that the words at the end of the paragraph first above quoted, viz., "to hold and to keep for his natural life," relate only to the bequest of the personal property, and do not qualify or limit the devise of the real estate made in the previous part of the same paragraph. We think that, upon the mere consideration of the language used in the will, it is not entirely clear that the construction must be that the words of limitation are confined to the bequest of the personal estate. Were we able to determine from the will itself that the devise of the real estate was a separate and independent sentence, and was intended to be such by the writer, and that the bequest of the personal property was a separate sentence, then the contention that the limiting words had relation to the bequest only would be the proper

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construction. But from the want of any attempt to punctuate the writing according to any known rules of punctuation, we are unable to say that the writer of the will intended the part of the paragraph devising the real estate as a separate and independent sentence, or that he did not intend the bequest as a part of the same sentence, and that the words "I also give," etc., were not intended as an addition to what was theretofore stated in the same sentence. The language is certainly not so plain that but one construction can be given to the words of limitation used in the will, and in that case it is the duty of the court to give such a construction to the words used as will evidently carry out the intention of the testatrix.

If we were permitted to consider what was said by the testatrix at the time of the execution of the will, and what the writer of the will meant by the language used, there could be no doubt as to the construction which should be put upon the limiting words. The court below found that if the intention of the testatrix as expressed at the time the will was executed, and the intention of the writer of the will, should govern its construction, then there could be no doubt but that the limiting words related both to the real and personal estate devised and bequeathed.

But the learned circuit judge decided, and we think rightly, that in giving a construction to the words of the will he was not at liberty to give any weight to the expressed intention of the testatrix at the time the will was executed, nor to the intention of the writer in drawing the will, and he finally decided that, notwithstanding the intention of the testatrix and the scrivener, the words of the will could only be construed as limiting the life estate to the personal property, and that as to the real estate the respondent took the fee. In this we think the learned circuit judge erred, even upon the words of the will, without any regard to the attendant circumstances. It is not clear that an es-

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tate in fee of the real estate was given to the respondent. The words "to hold and keep for his natural life" do not very aptly describe a life estate in personal property, while they are such words as would be naturally used by a person not having a technical education to express a life estate in real property.

If we consider the situation of the property of the testatrix at the time she made her will, and what was done between her and her husband after the will was executed, we think it is quite clear that the words of the will should be construed as giving a life estate only in the real property. That the testatrix expected that there would be a remainder of her estate left for the persons mentioned as the residuary devisees or legatees is very clear upon the face of the will, and yet upon the construction given to the will by the learned circuit judge it is evident nothing could pass under the clause giving the remainder of the life estate to her relatives mentioned in the last clause of her will. It appears that she was indebted to her husband at the time she made her will in a considerable sum, and nine months after making her will she gave him her note for $700, secured by a mortgage upon the same real estate he now claims was devised to him in fee by her will, the existence and contents of which were then known to him. In less than two years from the date of the will the testatrix died, and did not have personal property sufficient to pay her debts, and leaving her real estate incumbered by the mortgage of $700, with some interest thereon unpaid; how much, as said above, does not clearly appear. In the light of these facts it would seem absurd to construe her will as giving a life estate only in the personal property, when it was evident to the testatrix that such property would be entirely consumed in the payment of her debts.

It was contended by the learned counsel for the respondent that in construing the language of the will for the pur-

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pose of determining whether a life estate or an estate in fee was intended to be conveyed by the words used, nothing but the words of the will itself could be considered, and that the court was not at liberty to construe the words used in the light of the circumstances surrounding the testatrix at the time of the execution of the will. This claim is made upon the strength of sec. 2278, R. S. 1878, which reads as follows: "Every devise of land in any will shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it clearly appear by the will that the devisor intended to convey a less estate." This section has been a part of the law of this state since the revision of 1849.

Under the common law, in order to devise lands or real estate to a devisee in fee, it was necessary to use words of inheritance, or some other words showing an intention to give such estate, and a mere devise of real estate by description, without words of inheritance, gave such devisee only a life estate. See 3 Jarman on Wills (5th Am. ed.), 30 *et seq.*, and notes. Jarman says: "The proper and technical mode of limiting an estate in fee simple is to give the property to the devisee and his heirs, or to him, his heirs and assigns, forever; but such an estate may, even under will made before 1838, be created by any expressions, however informal, which denote the intention." This common-law rule was changed in England by act of Parliament in 1837, by a law quite similar to our sec. 2278, above quoted.

Our statute was undoubtedly enacted to get rid of the questions which might arise upon the construction of devises of real property under the common-law rule, by declaring that "every devise of land in a will shall be construed to convey all the estate of the devisor therein, without regard to the words used in the devise, unless," etc.; thus changing the rule as to the presumption of the estate devised. Under the common-law rule the presumption was

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that only a life estate was intended to be conveyed, unless words of inheritance were used, or other words showing an intent to devise a greater estate. This act was not intended in any other respect to restrict the power of the court, in the construction of wills, by limiting the courts in all cases of devises of real estate to the words of the will alone in determining the extent of the estate devised, unaffected by the surrounding circumstances which may properly have force and be considered in construing the language used by the testator and thus determining the real intent of the testator by the use of such language.

In view of the uncertainty which exists in the language of the will itself, occasioned by the want of accurate knowledge on the part of the writer as to the construction of sentences, apparent on its face, and of the fact that the testatrix had not, at the time of the execution of the will, and at the time of her decease, personal property enough to pay her just debts, we think it sufficiently appears that it was the intention of the testatrix that the limiting words in the will should attach to the real as well as personal estate devised, and that it should be construed as giving the respondent a life estate only in the real estate of which she died seized, situate in the said town of Concord, Jefferson county. We think such construction of this will is in harmony with the decisions of this court that, in the construction of the language used by a testator in his will, his manifest intention should be carried out, when it can be without doing violence to the meaning of the language used. *Eastman's Estate*, 24 Wis. 556; *Yearnshaw's Appeal*, 25 Wis. 21; *Golder v. Littlejohn*, 30 Wis. 344; *Estate of Goodrich*, 38 Wis. 492, 496; *Hopkins v. Holt*, 9 Wis. 228; *Wolf v. Shæffner*, 51 Wis. 53.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to that court to enter judgment in accordance with this opinion.

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JONES, Respondent, vs. JONES, imp., Appellant.

October 13 — November 3, 1885.

(1) Appeal to S. C.: Respondent's exceptions how far available. (2) Dower: Deed by husband on day of marriage: Fraud: Mortgages: Merger: Subrogation.

1. Exceptions taken by the respondent cannot be made available for the purpose of reversing the judgment or any part thereof.
2. Plaintiff conveyed certain land to his son, by way of advancement, subject to a mortgage of $1,500, which the son assumed, and it was verbally agreed that the plaintiff should have the possession and use of the premises during his life. Subsequently he conveyed a small additional strip of land to the son, and a settlement was had in pursuance of which the son gave the plaintiff his note for $2,500, secured by mortgage upon the whole premises. Afterwards the son, on his wedding day but before the marriage was consummated and without the knowledge of his intended wife, reconveyed the premises to this plaintiff. This last deed was lost before it was recorded. The plaintiff paid the $1,500 mortgage. After the son's death the plaintiff brought this action to establish his title to the premises and to bar the claim of the widow to dower. The widow counterclaimed to set aside the last deed to the plaintiff, and for the recovery of dower. Upon the evidence it is *held:*

   (1) The last deed to the plaintiff was in fraud of the defendant's right to dower, and she is entitled to dower notwithstanding, and to one third of the rents and profits from the time of filing her answer.

   (2) Such deed being void as to the dower right did not merge the $2,500 mortgage which was valid as against such right.

   (3) But the dower right is not subject to the $1,500 mortgage. Plaintiff's payment of that mortgage was in pursuance of the settlement, and he did not become subrogated to the rights of the mortgagee.

APPEAL from the Circuit Court for *Jefferson* County.

The action was brought against Price Lewis, executor of the last will and testament of Thomas C. Jones, deceased, and *Amanda L. Jones*, widow of said deceased, to establish the title of the plaintiff to certain real property in the city

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of Watertown, and to bar the claims of the defendants therein. The premises consisted of a lot having forty feet frontage, upon which stood a three-story brick building. This lot had been conveyed to the plaintiff and one Evans by two deeds, one conveying thirty-nine and one-half feet front, and the other conveying six inches front. The plaintiff afterwards conveyed his interest to his son, Thomas C. Jones, and the son subsequently reconveyed the same to the plaintiff, but the last-mentioned conveyance was lost before it was recorded.

The answer of the defendant *Amanda L. Jones*, contains a counterclaim praying that the deed from Thomas C. Jones to the plaintiff, if found by the court to have been in fact made, be adjudged void, fraudulent, and of no effect as to her, and that she recover her dower of the premises and one-third of the rents and income thereof from the date of her husband's death.

The case is more fully stated in the opinion. From the judgment entered in pursuance of the findings of fact and conclusions of law, the defendant *Amanda L. Jones* appealed.

Harlow Pease, for the appellant, to the point that the voluntary conveyance by Thomas C. Jones to the respondent without the knowledge of the appellant, to whom he was married a few hours later, was in fraud of her marital rights and just expectations, and was void as to her, cited *Baird v. Stearne*, 12 Weekly Notes, 205; *S. C.* 15 Phila. 339; *Duncan's Appeal*, 43 Pa. St. 67; *Robinson v. Buck*, 71 id. 386; *Belt v. Ferguson*, 3 Grant's Cas. 289; *Cranson v. Cranson*, 4 Mich. 230; *Pierce v. Pierce*, 71 N. Y. 154; White & Tudor's Lead. Cases (4 Am. ed.), 1156; *Waller v. Armisted's Adm'rs*, 2 Leigh (Va.), 11; *Kline v. Kline*, 57 Pa. St. 120; *Dearmond v. Dearmond*, 10 Ind. 191; *Logan v. Simmons*, 3 Ired. Eq. 487; Willard's Eq. Jur. 214; Story's Eq. Jur. 273, *n.* 3; *Chandler v. Hollingsworth*, 17 Am.

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L. Reg. 319; *England v. Downs*, 2 Beav. 522; *Chambers v. Crabbe*, 34 id. 457; *Goddard v. Snow*, 1 Russ. 485.

For the respondent there was a brief by *I. W. & G. W. Bird*, and oral argument by *Mr. G. W. Bird*. They contended, *inter alia*, that the deed from Thomas C. Jones was not made in fraud of the appellant's marital rights. At the time he executed such deed he held merely the naked legal title under a deed of gift, and the respondent had the right to the use and occupation of the premises during his life. Thomas C. Jones had never been in possession and had paid no part of either of the mortgages upon the land and none of the taxes which he had agreed to pay; so that the liens then held by the respondent amounted to over $5,214, while the premises were worth only $6,000. In addition to this there were the respondent's equities arising out of the voluntary character of his deeds to Thomas C. Jones. All the circumstances show the *bona fides* of the conveyance, that it was one which ought to have been made, and that it rested upon a good moral consideration. It cannot, therefore, be successfully attacked. See 1 Story's Eq. Jur. secs. 272–3; *England v. Downs*, 2 Beav. 522; *Blanchet v. Foster*, 2 Ves. Sr. 264; *Hunt v. Matthews*, 1 Vernon, 408; *De Manneville v. Crompton*, 1 Ves. & B. 354; *St. George v. Wake*, 1 Mylne & K. 610; *Jenny v. Jenny*, 24 Vt. 324; *Thayer v. Thayer*, 14 id. 107; *Baker v. Chase*, 6 Hill, 482. The cases cited by the appellant recognize and approve the rule that a deed having a good consideration to support it cannot be attacked as in fraud of marital rights. The receipt by Thomas of the voluntary conveyance from the respondent was in itself a sufficient consideration for a reconveyance. *Hyde v. Chapman*, 33 Wis. 391; *First Nat. Bank v. Bertschy*, 52 id. 451. The mortgagor may convey the equity of redemption to the mortgagee, and the widow cannot attack the conveyance or assert any dower in the promises. R. S. secs. 2162–3; *Foster v. Hickox*, 38 Wis.

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408; 4 Kent's Comm. 45; *Van Dyne v. Thayre*, 19 Wend. 162; *Jackson v. Dewitt*, 6 Cow. 316; *Stow v. Tifft*, 15 Johns. 458; *Decker v. Hall*, 1 Edmonds, 279.

ORTON, J. The respondent, the plaintiff in the circuit court, became owner of an undivided half of the main premises on the 14th day of May, and of the additional six inches on the 25th day of August, 1874, and on the 3d day of July, 1875, he and his wife conveyed the main premises, and on the 19th day of November, 1877, the additional six inches, to his son, Thomas C. Jones, without any valuable consideration, but of natural love and affection, and by way of advancement out of the estate of said plaintiff of the sum of $5,000, but subject to a mortgage on the main premises, then outstanding, of an unpaid balance of $1,500, at ten per cent. interest from May 14, 1875, which the said Thomas assumed to pay. It was understood and verbally agreed between the plaintiff and wife and the said Thomas, at the time of the execution of said deeds, that the plaintiff and wife, and each of them, should retain the possession of said premises, and have the rents, issues, and profits thereof during their natural lives, and the life of each of them, notwithstanding the covenants of said deeds.

At the time of the execution of the last-mentioned deed of the additional six inches of land, the plaintiff, for certain reasons hereafter to be noticed, demanded a settlement of their affairs of said Thomas, and it was then agreed that Thomas should give the plaintiff his note for the sum of $2,500, to become due ten years after date, with interest at eight per cent., payable annually, and secure the same by mortgage on the whole of said premises, which at that time was done accordingly. For more than one year before the 13th day of March, 1880, there had been a promise and contract of marriage between the said Thomas C. Jones and the defendant *Amanda L. Jones* to the knowledge of the

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plaintiff, and the time fixed for such marriage was on said day, in the evening thereof. Before that time arrived, and on said day, the said Thomas, for the purpose of placing the title of said premises back in the plaintiff, made, executed, acknowledged, and delivered a warranty deed thereof to the said plaintiff, which deed was never recorded and has been lost without the fault of the plaintiff, and in the evening of said day said marriage was consummated. The said defendant *Amanda* had no knowledge and had never heard of the execution of said last-mentioned deed until the death of her said husband, Thomas C. Jones, on the 3d day of May, 1881; and at the time of her said contract of marriage and the consummation thereof, she supposed and believed that said Thomas was the owner of said premises, and the fact of such conveyance was purposely concealed from her.

On the 3d day of May, 1881, Thomas C. Jones died, leaving the defendant *Amanda L. Jones* his only heir at law, but by his last will and testament, which was admitted to probate on the 19th day of July thereafter, he devised to said defendant *Amanda* one third of all his property, *real* and personal, in lieu of her dower, and the other two thirds thereof to his father, the said plaintiff. The personal estate of said Thomas did not exceed in value, over exemptions, the sum of $3,000, and the allowances to creditors and for expenses, etc., amounted to the sum of over $8,000, and the value of the premises so conveyed was $6,000, and the annual rental value thereof was $560. On the 20th day of April, 1882, the defendant, *Amanda L. Jones*, filed in the county court her written election to take the provisions made by law, instead of the provisions made for her in said will. On the 19th day of July, 1881, the day when said will was admitted to probate, one Price Lewis was duly appointed the executor thereof, and afterwards claimed said premises as a part of the estate of the said Thomas C. Jones,

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deceased, and demanded of the plaintiff an accounting for the rents and profits thereof, and filed a petition in the county court for license to sell the same to pay debts against the estate. This suit was brought to establish the title of the plaintiff to said premises, and to bar the claim of said executor and the claim of said *Amanda L. Jones* for dower therein.

The above are substantially the facts proved and found by the circuit court. As conclusions of law the circuit court found substantially that the said defendant *Amanda L. Jones* was entitled to dower as the widow of said Thomas, in said premises, subject to both of said mortgages, and the interest thereon until the present time, and was also entitled to one third of the rents and profits thereof, deducting the taxes, insurance, and reasonable repairs, from the time of serving her answer in the cause. It was also found that the $1,500 mortgage had been paid by the plaintiff, and that neither said mortgage nor the $2,500 mortgage was canceled by or had merged in the legal estate conveyed to the plaintiff by the deed of March 13, 1880.

Exceptions were filed by both parties to the findings, so far as they were unfavorable to their respective claims in the suit.

The learned counsel of the respondent contends that by virtue of the statute (secs. 2870, 2875, and 3070, R. S.) he may avail himself in this court of any exceptions taken by him to the findings of fact or conclusions of law, for the purpose of obtaining a reversal or modification of the judgment so far as it is adverse to the respondent, and therefore claims that the findings or conclusions of law that the said defendant *Amanda L. Jones* is entitled to dower in said premises, and that she is entitled to any rents and profits thereof in any share, or for any time, are erroneous. These provisions have been construed by this court in recent cases to allow the respondent to make available his exceptions only for the

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purpose of sustaining the judgment in his favor. After said provisions were enacted, the question whether such exceptions could be made available for the purpose of reversing the judgment or securing one more favorable to the respondent was for some time left an open one (*Stevens v. Millard*, 36 Wis. 83; *Maxwell v. Hartmann*, 50 Wis. 660); but in *Witt v. Trustees*, 55 Wis. 376, these provisions were fully considered, and it was held that exceptions taken by the respondent cannot be made available for the purpose of reversing the judgment, or any part thereof. This was followed by *Buchner v. C., M. & N. W. R. Co.*, 56 Wis. 403, and *McCrossen v. Lincoln Co.*, 57 Wis. 184, and the question may be considered at rest.

In view of this rule we do not feel called upon to review the findings of facts and conclusions of law which give to the defendant *Amanda* dower in said premises, and one third of the rents and profits thereof since the service of her answer herein, notwithstanding the deed of her husband, Thomas, to his father, the plaintiff, on the day of the marriage, but before its consummation. But we may say that the facts and circumstances of the transaction lead to the irresistible conclusion that both Thomas and his father intended by that deed to defraud the defendant *Amanda* of her prospective inchoate right of dower in the premises. The plaintiff knew of the contract of marriage to be consummated upon that day, and both he and Thomas made haste, just before such consummation, and so near to it as to preclude the possibility of her discovering it before the marriage, to thus defraud her of her prospective right. That deed was clearly voluntary, and, as stated in the finding, was made for the purpose of putting the title back in the father. It was kept from record, and the fact of its existence carefully concealed from the defendant for a long time, and Thomas made his will devising to the defendant one third of his *real* as well as personal estate in lieu of her

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dower, when, if that deed had been effectual to convey said premises, he had no real estate whatever to devise. To save Thomas from the imputation of such false, deceitful, and unnatural conduct towards his intended wife on the very day of the nuptials as to defraud her out of her expectant interest in his property, one might almost indulge the thought that that deed, now so mysteriously lost, was never fully delivered and was afterwards destroyed. The plaintiff's interest in the premises was amply secured, almost to their full value, by mortgages bearing an exorbitant rate of interest, leaving but little margin for that benevolent advancement to his son expressed as the consideration of his first deed to him of the main premises in 1875, for he is supposed to have claimed then, as he does now, that both mortgages were outstanding. The prospective dower interest of the defendant, subject to these mortgages and the claim that the plaintiff now makes that he is entitled to the possession and the rents and profits of the premises during his natural life, was so small at most that one can scarcely conceive of a meaner fraud than an attempt to deprive her of it by such an antenuptial conveyance, and the assumption may almost be indulged in that the plaintiff himself did not intend to accept it. The learned counsel of the respondent cites no authority holding an antenuptial deed valid under circumstances of near analogy to those surrounding this case.

We have said this much, and perhaps too much, upon this question, not really opened for review on this appeal, out of deference to the learned counsel on both sides, it having been discussed in both briefs. We think the circuit court was clearly right in not giving effect to the deed of March 13, 1880, made under such circumstances, as against the defendant's right of dower in the premises. That deed being void as to the defendant's right of dower, and the deeds of the plaintiff and wife to Thomas being absolute, with full covenants and without reservation, the defendant

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has a right to the proper share of the rents and profits of the premises, at least from the time of serving her answer in the case, as found by the circuit court. The verbal agreement at the time of the execution of said deeds that the plaintiff should remain in possession and receive the rents and profits of the premises cannot, of course, be set up as against such deeds or the rights of the defendant under the same. We think the defendant is entitled to such rents and profits from the time of filing her answer as found by the circuit court, and that is the true rule in such cases. *Zœgel v. Kuster*, 51 Wis. 31.

The only other important question in this case is whether the first mortgage, the balance of which was $1,500, and which was outstanding on the main premises when the first deed of 1875 was executed to Thomas C. Jones, and the payment of which he assumed, is still outstanding and unpaid, or whether, if paid and discharged by the plaintiff, he was subrogated to the rights of the mortgagee or assignee, and held the same as a valid lien on said premises at the time of the death of said Thomas C. Jones. That mortgage was given by the plaintiff and one Evans, the owner of an undivided half of the premises, to one Peter Bertholf, in 1874, and was assigned to the National Bank of Watertown, March 20, 1879, and paid by the plaintiff, and discharged of record in January, 1880. The deed of the plaintiff to Thomas C. Jones in 1875 was for an undivided half of the main premises, on which there was a large brick block. Afterwards the plaintiff obtained title to an additional six inches of land adjoining the same. It seems that the deed of 1875 was not delivered or recorded until in 1877, when the said Thomas obtained the possession of the same and placed it upon record. The testimony of one of the witnesses, the daughter of the plaintiff, was, in effect, that when the plaintiff ascertained that said deed had been recorded he was dissatisfied and said to Thomas: "We

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must have a settlement. Things are too open now. We must understand each other." "So they had a settlement then how they should stand as long as the deed was on record." It appears that thereupon the plaintiff conveyed also to Thomas the said additional six inches for the consideration named in the deed of $100, and that upon the same day Thomas executed a mortgage to the plaintiff upon the whole premises to secure his note then given to the plaintiff for the sum of $2,500, payable ten years after date, at eight per cent. interest, payable annually.

There is no direct evidence of what the consideration of that mortgage was. The inference, however, appears to us irresistible that that mortgage was intended to be the result of a final settlement between the plaintiff and Thomas of all their affairs, including the assumption by Thomas of the payment of the $1,500 mortgage, and that there was a ratification of the delivery and registration of said deed with such assumption discharged. The presumed value of the additional six inches was $100, and the consideration of the deed of 1875 remained unchanged in respect to an advancement of $5,000 and natural love and affection. What other possible consideration was there for the $2,500 mortgage except the $1,500 mortgage and ten per cent. interest accrued thereon? There was nothing else apparent that could have been the subject of settlement. In confirmation of this view the plaintiff afterwards voluntarily paid said mortgage and had the same discharged of record. We think that the circuit court ought to have found the defendant *Amanda L. Jones* entitled to dower in said premises subject *only* to the $2,500 mortgage, the only real or apparent incumbrance upon the same at the time of the death of said Thomas C. Jones.

It was contended by the learned counsel of the appellant that both of said mortgages merged in the legal title which the plaintiff obtained by the deed of March 13, 1880. That

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might be so if there was no good reason for keeping the mortgages alive. But the circuit court held, and this court holds, that the deed of March 13, 1880, was fraudulent and void as against the defendant's right of dower, and if, at least, said mortgage for $2,500 is not made to subsist as a valid incumbrance upon the premises, the plaintiff will lose whatever interest he had in the same as against such right of dower, and the only way in which his interest can be protected is to continue said mortgage upon the premises. That mortgage was a valid incumbrance upon the premises when the defendant intermarried with Thomas C. Jones, and she has no reason to complain that her right of dower is subject to the same. The deed of March 13, 1880, is no deed, as against her dower right, by reason of the fraud, and it cannot, therefore, work a merger or extinguishment of the mortgage as to such right. For these reasons we think it clear that equity would keep alive said mortgage. The deed being out of the way of her dower, the mortgage would spring up as a valid incumbrance to which her right would be subject the same as if such deed had not been made. It follows that it is essentially to the advantage of the plaintiff not to have said mortgage merge, and that it is no wrong to the defendant that it does not merge; bringing the case clearly within the authorities upon the question. *Webb v. Meloy*, 32 Wis. 319.

The findings and conclusions of law have not been specially referred to, and the order of argument of counsel has not been very closely followed; but the substantial facts have been considered, and such conclusions reached in respect to the rights of the parties as seem consonant with law and equity. We hold, then, (1) that the deed of Thomas C. Jones to the plaintiff of March 13, 1880, was executed in fraud of the defendant's right of dower in said premises, and that she is entitled to dower therein notwithstanding said deed; (2) that the defendant *Amanda L. Jones* is en-

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titled to one third of the rents and profits of said premises, deducting taxes and insurance and reasonable cost of necessary repairs, from the time of the filing of her answer in this case; (3) that the defendant is entitled to such dower, subject only to the mortgage of $2,500 executed by Thomas C. Jones to the plaintiff, November 19, 1877; (4) that the mortgage executed by the plaintiff and one Evans to one Bertholf, the balance of $1,500 of which was assumed to be paid by said Thomas C. Jones, was rightfully paid and satisfied by the plaintiff, and the said Thomas was discharged from the liability to pay the same by a settlement had between the plaintiff and said Thomas, and by the execution of said $2,500 mortgage, and that the plaintiff is not subrogated to the rights of the mortgagee or assignee of said mortgage by the payment of the same.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded with direction to render judgment in accordance with this opinion.

SUTTON, Appellant, vs. CHAPMAN, Respondent.

October 14 — November 3, 1885.

Appeal from J. P.: Reduction in amount of judgment already collected: Restitution.

Sec. 3772, R. S., providing for restitution of the amount collected upon a justice's judgment when the same is *reversed* on appeal, does not apply where the amount of the recovery is merely *reduced* in the appellate court. Upon the facts in this case it is *held* that the defendant must bring his action to recover the amount alleged to have been wrongfully collected.

APPEAL from the Circuit Court for *Columbia* County.

In May, 1883, the plaintiff *John J. Sutton* recovered a judgment in justice's court against the defendant, *Almeron*

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Chapman, for $159.77, damages, and $17.24, costs, and immediately filed a transcript thereof in the office of the clerk of the circuit court for Columbia county. *Chapman* appealed from the judgment, but gave no undertaking to stay execution, and an execution was issued and returned unsatisfied. In June, 1883, one Roberts recovered a judgment against *Chapman* for $154.34, damages and costs.

Afterwards, while the appeal of *Chapman* from the judgment in favor of *Sutton* was still pending, the latter together with Roberts commenced an action against *Chapman* in the nature of a creditor's bill to enforce collection of their said judgments. John Hasey and W. R. Taylor were also made defendants in such creditors' action, it being alleged that property of *Chapman* had been fraudulently conveyed to them. The venue of that action was duly changed to Jefferson county.

In April, 1884, while the appeal of *Chapman* from the justice's judgment and the creditors' action were both still pending, Hasey tendered to the plaintiffs in the latter action the full amount of the judgments which that action was brought to collect, together with interest, costs, etc., and such tender was accepted, and the creditors' action was discontinued.

In December, 1884, the appeal of *Chapman* from the judgment in favor of *Sutton* was tried in the circuit court for Columbia county, and the plaintiff had a verdict for $60, instead of the $159.77 recovered in the justice's court. Thereupon the court entered an order reciting that the defendant, *Chapman*, through said John Hasey, had paid the judgment appealed from, together with interest, costs, etc., amounting in all to the sum of $186.18, and directing the plaintiff to proceed to tax his costs, and adjudging that if the amount of such costs, together with the $60 damages, should exceed the sum of $186.18, paid by the plaintiff as aforesaid, then the plaintiff have judgment for such excess,

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but if said sum of $186.18 should exceed the amount of damages and the costs taxed, then the defendant have and recover such excess from the plaintiff. From that order the plaintiff, *Sutton*, appealed.

J. J. Sutton, appellant, *in pro. per.*

For the respondent there was a brief signed by *P. G. Stroud*, counsel, and *Geo. W. Stephens*, attorney, and oral argument by *Mr. Stroud.* They contended, *inter alia*, that even apart from sec. 3772, R. S., the circuit court had inherent power to make the order, under the circumstances of this case. *Flemings v. Riddick's Ex'r*, 50 Am. Dec. 119; *Jones v. Bradshaw*, 16 Grat. 362.

COLE, C. J. The order appealed from cannot be sustained on the ground that it was in the nature of a setoff of one judgment against another. The facts do not present a case for the exercise of that power on the part of the court. The equity suit, when settled, was pending in Jefferson circuit, and included other parties as well as the parties to this action. Undeniably that action had been settled, and the judgments sought to be collected in that proceeding had been paid. It is true, one of those judgments was the one in favor of the appellant which he had obtained in the justice's court. The respondent had taken an appeal from this judgment, but gave no bond to stay proceedings to collect the same. The appellant, after filing a transcript in the circuit court, and having issued an execution which was returned unsatisfied, together with M. J. Roberts commenced the equitable suit in the nature of a creditors' bill to collect their respective judgments against *Chapman.* This action was against the principal debtor and other persons to whom it was alleged he had transferred his property, for the purpose of placing it beyond the reach of his creditors. As we have said, it is an admitted fact that the judgments mentioned in the equity suit were paid and discharged;

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consequently there was no judgment in that action to be set off.

But the order made on the trial of the appeal action, doubtless, was supposed to be authorized by sec. 3772, R. S. That section provides that if a justice's judgment, or any part thereof, be collected, and the judgment be afterwards reversed, the appellate court shall order the amount collected to be restored, with interest from the time of the collection. Such order may be obtained, upon proof of the facts, upon notice and motion, and may be enforced as a judgment. Now, it is claimed that the case made by the affidavits is within the spirit, if not the letter, of this section; but the difficulty with that construction, as applied to this case, is that the judgment in the action of *Sutton v. Chapman* was not reversed in the circuit court on appeal. The amount recovered by the plaintiff in the justice's court was reduced in the appellate court nearly $100; but still the plaintiff had judgment in that court for $60, the amount found due him by the jury. So it is obvious that his judgment was not reversed, and the case did not come within the language of the section.

But it is claimed that the order of the circuit court fairly adjusted the rights of the parties, and should be sustained to prevent a circuity of action. In its order the court adjudged that the amount which the defendant was entitled to recover back on account of having paid the judgment in the equity suit was the sum of $186.18, less the sum of $60 and the costs taxed in the action on appeal. Whether this was a fair and equitable adjustment of the litigation between these parties depends entirely upon facts which cannot well be determined on affidavits. These facts are whether the payment of the judgment in the equity suit was not voluntary, and understood to be, at the time, a settlement of the suit then pending on appeal in the circuit court of Columbia county. On the affidavits now before us,

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we think these are very grave questions, which can only be determined by an action in the proper manner. If the appeal action was, in fact, settled, it is obvious it was no longer in court for trial. We therefore think that the defendant should be remitted to his remedy by action at law to recover what he claims has been wrongfully obtained from him by the plaintiff.

By the Court.—The order of the circuit court is reversed, and the cause is remanded for further proceedings in conformity with this opinion. And it is further ordered that upon the commencement of an action by the defendant to recover the money he claims has been wrongfully obtained from him, and upon his giving a sufficient bond for the payment of the judgment of $60 and costs and interest, the circuit court order a stay of all proceedings for the collection of that judgment during the pendency of such action.

GELZENLEUCHTER, Appellant, vs. NIEMEYER, Respondent.

October 14—November 3, 1885.

False imprisonment: Justification: Void warrant.

In an action for false imprisonment the defendant cannot justify his participation in the arrest and detention under a warrant issued by a magistrate unless such warrant was valid on its face.

APPEAL from the Circuit Court for *Columbia* County.

The case is thus stated by Mr. Justice CASSODAY:

"The complaint alleges in effect that November 13, 1883, the defendant, at Columbus, Columbia county, maliciously, and with force and arms, assaulted the plaintiff, and, with intent to injure him, directed, caused, and procured him to be forcibly, and against his will, arrested, imprisoned, and restrained of his liberty for the space of six hours, without

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any reasonable or probable cause whatever, and without any right or authority so to do, to his damage, etc. The answer justifies the arrest and imprisonment as being duly and lawfully made by the deputy sheriff of that county, under and by virtue of a criminal warrant duly and lawfully issued by a justice of the peace of that county, the body of which warrant is as follows:

"'Whereas, *Hy. W. Niemeyer* has this day made complaint, on oath, in writing, to the undersigned, a justice of the peace for said county, that *John Gelzenleuchter* did, on the 9th day of November, A. D. 1883, at the city of Columbus, in said county, unlawfully and maliciously use in reference to this complainant, and in the presence of John A. Kitzerow, abusive language, by calling the complainant 'a swindler,' which language naturally tended to provoke a breach of the peace, against the peace and dignity of the state of Wisconsin, and prays that the said *John Gelzenleuchter* may be arrested and dealt with according to law. Now, therefore, you are hereby commanded forthwith to apprehend the said *John Gelzenleuchter* and bring him before me, to be dealt with according to law. Given under my hand at Columbus this 9th day of November, 1883.'

"The plaintiff, on being brought before the justice, pleaded to the charge, procured an adjournment, and was released on his own recognizance; and on the adjourned day he was tried and found not guilty.

"On the trial of this action the plaintiff put in evidence to the effect that the complaint upon which the criminal warrant was issued, and therein mentioned, was made, signed, and sworn to by the defendant in this action, November 9, 1883; that said complaint was then filed with and by the justice, who thereupon issued the criminal warrant mentioned, reciting substantially all that is contained in the complaint, and delivered it to the defendant; that the defendant's attorney delivered the criminal warrant to the

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deputy sheriff, who arrested the plaintiff thereon, as stated, and kept him under arrest thereon for about three hours; that on the day the defendant made the complaint for the criminal warrant before the justice, he violently, and without any cause or provocation, assaulted, struck, kicked, and greatly injured the plaintiff. At the close of the plaintiff's testimony the court granted a nonsuit and dismissed the action, and from the judgment entered thereon the plaintiff brings this appeal."

For the appellant there was a brief signed by *J. C. McKenney*, counsel, and *J. J. Sutton*, attorney, and oral argument by *Mr. Sutton*.

For the respondent there was a brief signed by *Geo. W. Stephens*, attorney, and *P. G. Stroud*, of counsel, and oral argument by *Mr. Stroud*. Besides the cases commented upon in the opinion, they cited *Bonesteel v. Bonesteel*, 28 Wis. 245, 253.

CASSODAY, J. The attempt was made, as it is claimed, to prosecute the plaintiff for the violation of sec. 4398, R. S. It is not claimed that the plea of not guilty and adjournment before the justice was any waiver of the question of jurisdiction. It clearly was not within the rule stated in *Steuer v. State*, 59 Wis. 472. The learned counsel for the defendant frankly concedes that the complaint made by the defendant before the justice charges no offense whatever, and that the warrant issued thereon, reciting the complaint, charges no offense whatever; and hence that the warrant is absolutely void upon its face,— especially within the rule announced by this court in *Steuer v. State*, *supra*. With equal frankness the same counsel also concedes that the evidence in the record tends to show that the defendant maliciously made the complaint, and that he received the warrant from the justice, delivered it to his attorney, who delivered it to the officer for the purpose of having the

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plaintiff arrested thereon; and that the plaintiff was arrested and imprisoned thereon for the space of three hours. The counsel for the defendant also concedes that had the defendant caused the plaintiff to be arrested upon a void process in a civil action, then he would have been liable therefor in an action for false imprisonment, as this clearly is, even though he acted in good faith. But counsel ingeniously contends that "an action for false imprisonment cannot be maintained against a party who makes, or attempts to make, a criminal complaint to a magistrate, upon which the magistrate causes an arrest by issuing his warrant, whether the facts stated constitute an offense or not." In support of this contention he cites several authorities, English and American.

A careful reading of these cases discloses the fact that they are all distinguishable. In *Beaty v. Perkins*, 6 Wend. 382, both the warrant and the complaint upon which it was issued seem to have charged an offense, and of course it was held that the party making the complaint was not liable in trespass. In *Stewart v. Hawley*, 21 Wend. 552, the constable who made the arrest was the party who made the complaint to the justice, and it was held that an action of trespass or false imprisonment could not be maintained against him or the justice, and this was put on the ground that the recitals in the complaint and warrant presented "a case within the jurisdiction of the justice, and which called for the exercise of his judicial functions, and if so, though he may have erred, he is not liable." Page 556. Chief Justice Nelson said: "I cannot agree with the plaintiff that the facts are so barren as not to lay the foundation for jurisdiction, or that the decision was so gross as to afford evidence *per se* of the influence of bad motives." In *Von Latham v. Libby*, 38 Barb. 345, the opinion of the court expressly states that "the only connection of the defendants with the arrest or detention of the plaintiff . . . is that

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they stated their case to the magistrate, charging the plaintiff with a misdemeanor upon the facts which they swore to, and asked for his arrest;" and for that reason it was held that they were not liable for false imprisonment. Several of the other cases relied upon by counsel are to the same effect, as in *Murphy v. Walters*, 34 Mich. 180; *Grinham v. Willey*, 4 Hurl. & N. 496; *Barber v. Rollinson*, 1 Cromp. & M. 330; *Carratt v. Morley*, 1 Q. B. 18; *West v. Smallwood*, 3 Mees. & W. 418. The true distinction is sharply made in the last two cases cited. In *West v. Smallwood* the warrant of arrest was without jurisdiction, and it was held that a party merely making a complaint before a magistrate on a subject over which he has general jurisdiction is not liable to false imprisonment; but it was held that the fact that the complainant accompanied the constable charged with the execution of the warrant "was evidence to go the jury of a participation in the arrest." In *Carratt v. Morley* the former was arrested on a warrant issued on a judgment by default, in a civil action in favor of the latter, but Morley in no way participated in making the arrest. Carratt then brought an action of trespass for false imprisonment against Morley, the six commissioners who ordered the warrant to be issued by their clerk, and the officer making the arrest. The commissioners were without jurisdiction. Lord ABINGER thought that Morley was "not liable, inasmuch as he had only stated his case to the commissioners, who proceeded to adjudge upon it," but was in doubt as to the commissioners and the officer, and "leave was therefore reserved to move for a nonsuit generally, and on the other hand for a verdict against all the defendants except" Morley. The court of Queen's Bench, per Lord DENMAN, C. J., held that they were all liable except Morley.

Such are the authorities upon which we are asked to sustain the nonsuit. It will be observed that none of the cases cited go to the extent of holding that a warrant void upon

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its face is a defense in an action of false imprisonment for one who participated in making the arrest. On the contrary, two of the cases squarely hold that such void warrant is no protection to such a person in such an action. Had the defendant done nothing more than to have sworn to the complaint before the justice, he would not, under these authorities, have been liable in this action. But here there is some evidence tending to prove that after the warrant was issued the defendant did participate in making the arrest. The distinction between false imprisonment and malicious prosecution was indicated in *Murphy v. Martin*, 58 Wis. 279. In that case it was held that the fact that the warrant upon which the arrest was made was void on its face was not available to the plaintiff in an action for malicious prosecution, but only in an action for false imprisonment. If the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution. *Ibid.; Elsee v. Smith*, 2 Chit. 304; *Nebenzahl v. Townsend*, 10 Daly, 236; *Brown v. Chadsey*, 39 Barb. 260–263. In such an action the imprisonment cannot be false, for it is upon lawful process, and hence by lawful authority. False imprisonment, on the other hand, is a trespass committed against a person by unlawfully arresting and imprisoning him without any legal authority. *Ibid.;* 2 Add. Torts, 798; *Bourden v. Alloway*, 11 Mod. 180; *Burns v. Erben*, 40 N. Y. 463; *Lock v. Ashton*, 12 Q. B. 871. Thus the arrest of the right person by the wrong name, through a misnomer in the process, without an allegation that the true name is unknown, is false imprisonment. *Hoye v. Bush*, 1 Man. & G. 775; *Scheer v. Keown*, 29 Wis. 586. Where, in an action for false imprisonment, the arrest and detention is admitted, and the only justification relied upon by a defendant having participated therein is that such arrest and detention were under a warrant issued by a magistrate, it must appear, in

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order to be available, that such warrant was valid upon its face. *West v. Smallwood*, 3 Mees. & W. 418; *Carratt v. Morley*, 1 Q. B. 18; *Grumon v. Raymond*, 1 Conn. 40; *Poulk v. Slocum*, 3 Blackf. 421; *Vaughn v. Congdon*, 56 Vt. 111; *Hoye v. Bush*, 1 Man. & G. 775; *Blythe v. Tompkins*, 2 Abb. Pr. 468; *Flack v. Harrington*, 12 Am. Dec. 170; *Gold v. Bissell*, 1 Wend. 210; *S. C.* 19 Am. Dec. 480; *Floyd v. State*, 54 Am. Dec. 250; *Mitchell v. State*, id. 253, and notes to cases; *Smith v. Shaw*, 12 Johns. 257; *Miller v. Adams*, 52 N. Y. 409; *Abbott v. Booth*, 51 Barb. 546; *Harwood v. Siphers*, 70 Me. 464; *Gorton v. Frizzell*, 20 Ill. 291; *Sheldon v. Hill*, 33 Mich. 171; *Green v. Elgie*, 5 Q. B. 99. There must not only be a jurisdiction of the subject matter, but also a jurisdiction of the process. *Grumon v. Raymond, supra; Vaughn v. Congdon, supra.* A warrant absolutely void upon its face, as the one before us is conceded to be, is necessarily a nullity,—mere waste paper,—and hence, in an action of false imprisonment, can afford no protection to one participating in making an arrest under it.

The evidence tending to show that the defendant participated in making the arrest after the warrant was issued is weak, but we think it was sufficient to take the case to the jury.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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MERACLE, Respondent, vs. DOWN, Appellant.

October 14 — November 3, 1885.

(1) Change of venue: Ch. 314 of 1883. (2) Evidence of enactment of statutes: Printed copies. (3) Evidence: Immaterial error. (4) Vicious dog: Scienter. *(5) Identity of dog: Evidence. (6–8) Contributory negligence: Instructions to jury: Loose seat in vehicle. (9) Excessive damages.*

1. Ch. 314, Laws of 1883, was never enacted by the legislature, and hence is not a law.
2. Sec. 4135, R. S., providing that the printed copies of the statutes shall be *sufficient* evidence thereof, does not make them *conclusive* evidence that a statute therein contained was enacted by the legislature. That such statute was not so enacted may be shown by the legislative journals.
3. An error in admitting testimony is immaterial if the other evidence upon the point is conclusive.
4. In an action for an injury caused by a dog, notice to or knowledge by the owner of its vicious character need not be shown. Sec. 1620, R. S.
5. In an action for injuries alleged to have been caused by defendant's dog attacking plaintiff's horses, it appeared that a neighbor living a mile distant also had a dog which the plaintiff admitted was very much like that of the defendant in form, shape, and general appearance, but it did not appear that the neighbor's dog was ever at the defendant's place where the attack was made. *Held*, that it was not error to exclude evidence that the neighbor's dog, like that of the defendant, was accustomed to attack horses.
6. Evidence showing that while plaintiff was driving along the highway in the dusk of evening his horses were suddenly attacked by a dog and jumped and kicked, and that plaintiff raised himself by the reins to his feet and while in that posture was thrown from the wagon and injured, is *held* not to show contributory negligence on his part.
7. A charge to the jury stating that one of the issues was whether the plaintiff was injured while he was "free from any fault causing or contributing directly to the injury," and that "if the injuries to plaintiff were caused by his intoxication, or by the loose manner in which the seat was placed upon the buggy in which he was riding, and not by the defendant's dog, the plaintiff would not be entitled

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to recover,"— is *held* to state sufficiently the law of contributory negligence applicable to those facts.

8. But *quære* whether negligence can be predicated upon the fact that the seat in a vehicle is not securely fastened thereto.

9. A verdict for $1,600 damages is *held* not excessive where plaintiff's arm was broken and the use of his hand probably permanently impaired.

APPEAL from the Circuit Court for *Jefferson* County.

This is an action brought to recover damages for personal injuries sustained by the plaintiff by means of a fall from his wagon when driving his team along the public highway in front of defendant's dwelling. The alleged grounds of action are that the defendant was the owner of a dog which he allowed to run loose about his premises, and that the dog ran into the street, attacked plaintiff's team, bit one of them, and so frightened and crazed them that they jumped, kicked, and ran away, throwing the plaintiff from the vehicle and causing the injuries complained of. The vicious or mischievous propensity of the dog to attack and bite horses is alleged.

The testimony on the trial tended to show that the dog was theretofore accustomed to attack, worry, and bite horses, and that the plaintiff was injured because of an attack made by the dog upon his horses as alleged. The jury found for the plaintiff and assessed his damages at $1,600. A motion for a new trial was denied, and judgment entered for the plaintiff pursuant to the verdict. The defendant has appealed from the judgment. The case is further stated in the opinion.

For the appellant there was a brief signed by *Winfield Smith*, of counsel, and *Winfield Smith* and *Vince H. Faben*, attorneys, and the cause was argued orally by *Mr. Smith*. They contended, *inter alia*, that it was error to refuse to instruct the jury that the plaintiff could not recover if his negligence contributed to produce the injury. The gist of the action is the defendant's negligence in failing to keep a

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vicious dog securely; and it is the universal rule that in such an action the plaintiff's contributory negligence defeats his action. *Vrooman v. Lawyer*, 13 Johns. 339; 1 Thomp. on Neg. (ed. 1880), p. 222, § 37; 2 id. p. 1002, note 3, pp. 1174–5, §§ 22, 23, p. 1004, subd. (5), note 1, pp. 1203, 1208, §§ 50, 51, 55; *Williams v. Moray*, 74 Ind. 25; Cooley on Torts, 346; Shearm. & Redf. on Neg. sec. 199; *Smith v. Pelah*, 2 Strange, 1264; *Blackman v. Simmons*, 3 Carr. & P. 138; *Ward v. Smith*, 4 id. 302; *Curtis v. Mills*, 5 id. 489; *Loomis v. Terry*, 17 Wend. 496; *Logue v. Link*, 4 E. D. Smith, 63; *Munn v. Reed*, 4 Allen, 431; *Muller v. McKesson*, 73 N. Y. 201, 202. There was evidence from which the jury might have found that the plaintiff was negligent in three respects: (1) In drinking to excess so as to lose self-control on the afternoon of the accident. *Hubbard v. Mason City*, 60 Iowa, 400; *Ill. Cent. R. Co. v. Cragin*, 71 Ill. 177; *Cramer v. Burlington*, 42 Iowa, 315. (2) In so loading his wagon that the seat could not be and was not securely fastened. (3) In his bad driving. If plaintiff had maintained his seat he would not have been thrown out. But he rose to his feet, the most dangerous position and one most likely to cause the injury which occurred. *Flower v. Adam*, 2 Taunt. 314; *Brooks v. Petershan*, 16 Gray, 181; *Gray v. Second Ave. R. Co.* 65 N. Y. 561.

For the respondent there was a brief by *I. W. & G. W. Bird*, and oral argument by *Mr. G. W. Bird*. They argued, among other things, that even if the proofs presented below failed to show that ch. 314, Laws of 1883, was never enacted by the legislature, yet, the question being raised here, this court will examine the records in the office of the secretary of state, and satisfy itself upon that point. 1 Greenl. on Evi. sec. 482; 1 Wharton on Evi. sec. 290; *Gardner v. Collector*, 6 Wall. 499; *Walnut v. Wade*, 103 U. S. 683; *Purdy v. People*, 4 Hill, 384; *DeBow v. People*, 1 Denio, 9; *Young v. Thompson*, 14 Ill. 380; *Spangler v.*

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Jacoby, id. 297; *Speer v. Plank Road*, 22 Pa. St. 376; *In re Welman*, 20 Vt. 656; *Supervisors v. Heenan*, 2 Minn. 330; *Fowler v. Pierce*, 2 Cal. 165; *Bound v. W. C. R. Co.* 45 Wis. 543, 558. See, also, *Bradley v. Cramer*, 61 Wis. 572; *Giese v. Schultz*, 60 id. 451, and cases cited in brief of respondent. Contributory negligence does not defeat a recovery in this class of cases. The action is not based upon defendant's negligence in the ordinary acceptation of that term. It is his duty, at his peril, to restrain his vicious dog. No well-considered case has gone further than to hold that if a person with full knowledge of the evil propensities of an animal wantonly excites him or unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself and so not be entitled to recover. *Muller v. McKesson*, 73 N. Y. 195; *Lynch v. McNally*, id. 347; *Woolf v. Chalker*, 31 Conn. 130; *Denison v. Lincoln*, 131 Mass. 236; *Pickering v. Orange*, 1 Scam. 492; *M'Caskill v. Elliot*, 5 Strobh. Law, 196; *Mann v. Weiand*, 81 Pa. St. 243; *Brown v. Carpenter*, 26 Vt. 638; *Glidden v. Moore*, 14 Neb. 84; *Loomis v. Terry*, 17 Wend. 496. See, also, *Meibus v. Dodge*, 38 Wis. 308. The plaintiff was rightfully in the highway, and the dog, as to him, was a trespasser. The owner was liable, therefore, without regard to the question of plaintiff's contributory negligence. *Chunot v. Larson*, 43 Wis. 536. The statute (sec. 1620, R. S.), also, makes the owner's liability absolute.

LYON, J. 1. The defendant applied for a change of the place of trial from Jefferson county, where the action was pending, to some other county. The application was made solely on his affidavit that he had good reason to believe, and did believe, that he could not have a fair trial of the action on account of the prejudice of the people of Jefferson county. The circuit court granted the application, but subsequently, during the same term and while the record

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still remained in such court, vacated the order changing the place of trial, and the cause was afterwards tried in the circuit court of Jefferson county. The vacating of such order is assigned for error.

The order changing the venue was made pursuant to ch. 314, Laws of 1883, which was supposed to be a valid law. The affidavit upon which the order was granted is entirely insufficient to authorize it under any other statute. It was vacated because it was made to appear to the court, by affidavit and reference to the legislative journals of the session of 1883, that ch. 314 was never enacted by the legislature. It passed the assembly, but was indefinitely postponed in the senate. Through some blunder it was enrolled as an act passed by both houses, was presented to the governor, and approved by him, and published as a law duly enacted. That it never was enacted, and hence is not a law, appears by the legislative journals and the records in the office of the secretary of state, of which probably the courts should take judicial notice; but if not, they seem to have been sufficiently proved.

Sec. 4135, R. S., makes an authorized printed statute sufficient evidence thereof, but we cannot think the legislature intended thereby to make that a law which, although so printed, was never enacted by both branches of that body. Evidence may be sufficient and yet not conclusive. To hold that ch. 314 is a valid law merely because it has been printed as such in the statutes, when it was never enacted, would be, in effect, to vest the power of legislation in some dishonest or inaccurate clerk. Of course the legislature, when it enacted sec. 4135, could not have intended anything so absurd and intolerable. We conclude, therefore, that the presence of ch. 314 in the Session Laws of 1883 is only *prima facie* evidence of its enactment by the legislature, which evidence is entirely rebutted by the conclusive proof that it was not so enacted.

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The circuit court properly vacated the order changing the place of trial thus inadvertently made.

2. John Yoe, a witness called by the plaintiff, testified that immediately after the plaintiff was injured, he went to the defendant's house and informed Miss Down, the defendant's sister (who resided with him), and in his presence, of the accident and the cause of it, and that the sister replied: "The dog is always doing something. I have licked him many a time for running out at teams." Yoe also testified that defendant was asleep, but that they called his attention, and then he awoke. The defendant moved to strike from the testimony of Yoe all the conversation related by him which occurred when defendant was asleep. The court overruled the motion.

The material portion of that conversation was the remark of Miss Down, above quoted, which tended to show the vicious or mischievous habit of the dog. Certainly the defendant was awake some of the time when Yoe was there, and we are unable to find any satisfactory proof that he was asleep when such remark was made by his sister. He testified subsequently that he was not asleep when Yoe was there. Besides, if the testimony of what the sister said should be excluded, it is abundantly proved by other evidence in the case that the dog had been theretofore accustomed to bite, worry, and frighten horses. The testimony to this effect is so convincing and overwhelming that a special verdict to the contrary would have been set aside as against the evidence. We think the testimony was properly retained. If it was not, the error is rendered quite immaterial by the other proofs in the case.

3. Testimony was admitted, against defendant's objection, tending to show that about three months after the plaintiff was injured the dog attacked and bit a horse of Mr. Code, which he was driving before a buggy, and that Mr. Code immediately informed the defendant what his dog had done.

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This testimony goes to show the vicious character of the dog, and the defendant's knowledge thereof. Probably it was inadmissible and should have been rejected. But the error is immaterial for the reason that the vicious character of the dog was conclusively proved by other and competent testimony, and it was not necessary to the action to prove the *scienter*. The statute dispenses with such proof. R. S. sec. 1620. Hence such error must be disregarded. Sec. 2829, R. S. It was argued that this testimony might have enhanced the damages. But that cannot be, because only compensatory damages were allowed or given.

4. It appeared on the trial by the testimony, and by the admission of counsel for the plaintiff, that one Williams, a neighbor of defendant, owned a dog very similar in appearance to that of defendant. Williams resided a mile from defendant. It is not claimed that there is any proof that the dog of Williams was accustomed to go to defendant's place, or that he was ever there.

The court rejected testimony offered for the purpose of showing that the Williams dog was also accustomed to attack, worry, and bite horses. Clearly the ruling was correct. The material question was, Did the dog of defendant or the dog of Williams do the mischief? The character of the latter dog was not in issue. The offered testimony, had it been received, would have raised a side issue which the pleadings did not call upon the plaintiff to be prepared to litigate. At most it was a mere make-weight, and we recall no rule of evidence which would justify the admission of the rejected testimony.

Counsel ingeniously argues that the testimony should have been received as adding another point of similarity common to the two dogs. But that seems scarcely necessary after the plaintiff had admitted that "they are very much alike in form, shape, and general appearance."

5. Mrs. Yoe, a witness for plaintiff, testified that she was riding with Miss Down the summer before plaintiff was

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injured, and defendant's dog attacked and frightened the team they were driving. She was allowed to testify, under objection, to an admission then made by Miss Down that the dog had the bad habit of running at horses. Miss Down was cross-examined as to that conversation and denied any recollection of it.

It is claimed that the testimony was admissible as tending to impeach the credibility of Miss Down. We fail to find any testimony given by her as to the habits and character of the dog, and are inclined to think that when plaintiff examined her on that subject (which was entirely outside her testimony in chief) he made her his own witness to that extent, and was bound by her statement. But the conversation went only to the question of the character and habits of the defendant's dog, and we have already seen that he was proved to be vicious or mischievous beyond the power of a jury to find otherwise. So the error in admitting the impeaching testimony (if error it was) is of no importance.

6. The circuit judge instructed the jury at considerable length, and gave several instructions proposed on behalf of the plaintiff. He refused to give several instructions on behalf of the defendant in the terms proposed. Errors are assigned upon such refusal, and upon some portions of the general charge. These will now be considered.

After a careful examination of the charge and instructions so given, and of the instructions proposed on behalf of defendant, we think all of the propositions contained in the last-mentioned instructions were substantially and sufficiently given, except the following: (1) Proof that the dog of defendant attacked horses in one or two instances does not prove a vicious habit. (2) Playfully seizing the horses of the defendant, with which the dog was accustomed to play, does not amount to such habit. (3) The defendant is not liable unless, before the injury, he had notice of the vicious propensity of his dog.

The first and second propositions are inapplicable to the

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case, for the uncontradicted testimony proves that during the two years before the plaintiff was injured, the dog repeatedly attacked and frightened horses which were being driven on the highways. The third proposition was properly refused, because, as already stated, the statute (sec. 1620, R. S.) dispenses with the necessity of proving the *scienter*.

One of the proposed instructions is that the plaintiff cannot recover if his negligence contributed to produce the injury. This instruction was sufficiently given in the general charge.

The only facts upon which it is claimed that the plaintiff was guilty of contributory negligence are these: The plaintiff was returning home from Palmyra when he was injured. While there, he drank two or more glasses of beer. When the dog made the attack, the horse attacked sprang and kicked over the tongue of the wagon. The plaintiff raised himself by the reins to his feet to hold the horse. The horse again kicked, and threw the plaintiff back on the seat, which tipped out of the wagon, throwing the plaintiff to the ground and inflicting the injuries complained of. The seat rested on cleats placed there to support it, but was not fastened thereto. If the plaintiff was guilty of contributory negligence, it consisted either (1) in being intoxicated; or (2) in rising to his feet in his effort to hold the horses; or (3) in using the wagon without having the seat fastened to the cleats.

No jury would be justified in finding that it was negligence for the plaintiff to rise to his feet when his horse suddenly kicked and became frightened. Drawing tightly upon the reins necessarily had a tendency to raise him from his seat, especially if his feet were braced against anything, as they probably were. Besides, he was acting in a sudden and dangerous emergency, without time for deliberation, and the natural impulse would be to rise, for the purpose of

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ascertaining the cause and the extent of the peril. Especially would this be so in the dusk of the evening. The accident occurred about 8:30 P. M. on the 7th of April.

This leaves only the alleged intoxication of the plaintiff and the want of seat fastenings, upon which to rest the claim of contributory negligence. The jury were told that one of the issues in the case was whether the plaintiff was injured while he was "free from any fault causing or contributing directly to the injury;" and further that "if the injuries to plaintiff were caused by his intoxication, or by the loose manner in which the seat was placed upon the buggy in which the plaintiff was riding, and not by the defendant's dog, the plaintiff would not be entitled to recover." This we think a sufficient statement of the law concerning contributory negligence. We should hesitate, however, to hold that such negligence could be predicated of the fact that the seat was not fastened. We are aware of no rule of law which requires each person who rides in a wagon to keep the seat upon which he sits securely fastened to the vehicle, at his peril of being chargeable with negligence. Indeed, it is quite doubtful whether there was sufficient evidence tending to show contributory negligence on the part of the plaintiff in any particular to justify the submission of that question to the jury.

The court also instructed the jury as to the relative weight of positive and merely negative testimony, upon which instruction error is assigned. The instruction need not be here stated, because it related solely to the testimony of the character and habit of the dog, which, as already stated, was conclusively established. Had the court held (as it might properly have done) that the dog was proved to have the vicious or mischievous habit of biting, worrying, and frightening horses, no question of the relative weight of positive and negative testimony on that subject could arise. Hence the instruction is unimportant.

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7. The last error assigned is that the damages are excessive. It must be conceded that the jury awarded quite liberal damages, yet, under well-settled rules, this court cannot disturb the verdict. The plaintiff's arm was broken — there being a transverse fracture of the radius,— a simple fracture three-fourths of an inch from the wrist joint (as we understand the testimony of the attending surgeon). The plaintiff was unable to work for three months, and then only with one hand, down to the trial, ten months after the injury. He could not then shut his hand. He has a wife and four children, and is about thirty years of age. Before he was hurt he was a farm laborer, and could earn from $20 to $25 per month besides his board. At the time of the trial he could not perform many kinds of farm labor, and could earn but little.

The testimony is sufficient to support a finding that the injury will be permanent; that he will never again have the use of his hand as before the accident. In such a case this court has held many times that it cannot disturb a verdict for excessiveness of damages unless they are so great as to be evidence of passion, prejudice, or corruption on the part of the jury. We have no such case here.

Our conclusion is that the record discloses no error of which the defendant can justly complain.

By the Court.— The judgment of the circuit court is affirmed.

CRIBB, Appellant, vs. HOUGHTON and another, Respondents.

October 15 — November 3, 1885.

(1) Promissory notes: Deposit as collateral. (2) Waiver of protest and notice: Guaranty: Statute of frauds.

1. The evidence in this case is *held* to sustain a verdict to the effect that notes alleged to have been converted by defendants were held by them as collateral security for an indebtedness of the plaintiff.

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2. Defendants discounted notes belonging to the plaintiff under an agreement that they would protest the same or cause them to be protested if they could, but would not be responsible for protest; that the plaintiff would, in any case, be responsible for the payment of the notes, would bear the risk of collecting them, and would at all times keep collaterals in defendants' hands as security for such collection. *Held*, that such agreement was not within the statute of frauds.

APPEAL from the County Court of *Milwaukee* County.

Action to recover the value of eleven promissory notes of various amounts, aggregating in all $679.15, alleged to have been delivered by the plaintiff to the defendants, as his bankers, during the years 1883 and 1884, for collection, and which they refused, after a demand, to surrender or account for. The answer admits possession of the notes and their value and the refusal to give them up on demand. It alleges, as a defense, that prior to the receipt of the notes in suit the defendants had discounted for the plaintiff three other notes of his customers; that it was agreed that the plaintiff should be credited with the amounts thereof in his account, but should be responsible to the defendants for the amounts so credited and should bear the risk of collecting the same, and that he should at all times keep collaterals in the hands of the defendants as security for the collection of the same; that said three notes are now in the hands of lawyers for collection and have not yet been collected; that plaintiff delivered collaterals to defendants and from time to time changed the same, and delivered the notes in suit as collaterals in pursuance of said agreement, and that the defendants held the same accordingly.

The evidence given on the trial is sufficiently stated in the opinion. There was a verdict for the defendants, and from the judgment thereon the plaintiff appealed.

Chas. M. Bice, for the appellant, to the point that the parol contract of guaranty alleged to have been made at the time of discounting the three notes mentioned in the

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answer, was void under the statute of frauds, and evidence thereof should not have been admitted, cited *Day v. Elmore*, 4 Wis. 194; *Emerick v. Sanders*, 1 id. 77.

For the respondents there was a brief by *Jenkins, Winkler & Smith*, and oral argument by *C. H. Van Alstine*. To the point that the agreement that the defendants should not be responsible for the protest of the notes indorsed by the plaintiff and discounted for him was in substance a waiver of demand and notice on the part of the plaintiff, and that he might waive the same by parol, they cited *Worden v. Mitchell*, 7 Wis. 161.

CASSODAY, J. It seems to be conceded that the plaintiff was in the habit of taking notes from his customers in different parts of the country; that he did his banking business with the defendants from 1872 to February 25, 1884; that during that time he had frequently obtained credit with the defendants on his account or individual note, leaving with them the notes so taken from his customers as collateral.

The testimony on the part of the plaintiff tends to show that in February, 1884, he borrowed of them $600, and gave them his individual note therefor, together with the notes mentioned in the complaint as collateral security, upon the agreement that those notes should be returned on the payment of his individual note; that his individual note had been paid, and the notes so left as collateral demanded and refused before the commencement of this action. The testimony on the part of the plaintiff further tends to prove that the defendants were in the habit of discounting notes taken by the plaintiff in his business and then indorsed by him and left with the defendants, and that in all cases where any such notes so indorsed were unpaid, the defendants were to protest the same, or cause the same to be protested, and when so protested and not paid by the makers, the plaintiff would pay the amount or allow it to be charged up to his

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account. The plaintiff also testified: "*Mr. Houghton* before this might have told me Wagner (a maker of one of the three notes) was slow, but I told him to protest the notes and send them right back; but I left collaterals always, $5,000 or $6,000,— if any of them failed or I failed."

There was evidence on the part of the defendants, tending to prove that during the time named the plaintiff did business with them under an agreement that for all notes they discounted for him he was to keep other notes as collateral for their payment, in case they were not paid; that the defendants should protest or cause to be protested, when they could do so, the notes discounted or left with them, but should not be responsible for the protest of any of the notes so discounted or left as collateral; that they could not undertake to have the notes protested, as some banks did not know enough to do it; that among the notes so discounted were three given in 1881–82, described in the answer, amounting in the aggregate to $603.99 and interest; that neither of those notes were protested by the banks to which the defendants had sent them for collection and protest; that the defendants had made efforts to collect those three notes at the instance and for the accommodation and benefit of the plaintiff; that the plaintiff kept in the hands of the defendants all the time collaterals for the payment of each of the three notes so discounted; that as any of such collaterals were paid from time to time the plaintiff brought to the defendants new collaterals in their places; that the eleven notes mentioned in the complaint were left by the plaintiff, and were to remain as collateral for any indebtedness he owed to the defendants; that when they were deposited by the plaintiff, he mentioned that they should be held as collateral security for the three discounted notes set forth in the answer; that such collaterals were to remain with the defendants until the suits brought to collect the three discounted notes should be decided, and if

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against the plaintiff, then the defendants could take the amount of such three notes out of such collaterals; that the collaterals which the plaintiff had at the bank were left there to secure other notes than were discounted from time to time; that the plaintiff occasionally gave his notes, and these notes as collaterals; that all the notes were held by defendants as collateral for any individual note which might be given by the plaintiff, or any note which the defendants discounted in the country; that the plaintiff gave the $600 note at the time the eleven notes were left.

The jury were at liberty to believe the evidence given on the part of the plaintiff, or the evidence given on the part of the defendants. They chose to believe the latter. We think it is sufficient to sustain the verdict.

The agreement in relation to the risk of protesting notes not paid and the collection of them and keeping collaterals was clearly not within the statute of frauds. Counsel does not seriously contend that it was.

The charge of the court is criticised by counsel as "peculiarly unintelligible and mystifying to the jury." But we are constrained to think it substantially embodies all the requests to charge made by counsel, and in effect fairly submits the material questions of fact upon which the parties were at variance. We deem it unnecessary to go into any analysis of the charge.

By the Court.—The judgment of the county court is affirmed.

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BUFFALO BARB WIRE COMPANY, Respondent, vs. PHILLIPS and another, Appellants.

October 15 — November 3, 1885.

PRACTICE: PLEADING. *(1) Admission of part of claim: Order for payment. (2) Damages: Loss of business by failure to deliver goods ordered.*

1. Where the answer admits part of the plaintiff's claim to be just, an order may be entered requiring payment of that part.
2. Allegations, in a counterclaim, that the failure of the plaintiff to deliver goods of the kind and quality ordered prevented defendants from entering into the business of selling them in the season therefor, to their damage, etc., are insufficient to lay a foundation for the recovery of damages without a further allegation that the plaintiff knew the special circumstances and the purpose for which the goods were ordered.

APPEAL from the County Court of *Milwaukee* County.

Action upon an account for wire sold to the defendants to the amount of $948.11. The answer, after denying all allegations of the complaint except as admitted, admitted that the defendants purchased the wire of the plaintiff but denied that it was "worth the sum of $948.11, or any other sum except the sum of $598.11." It also contained a counterclaim for breaches of warranty as to quality of the wire, by reason whereof the defendants "have been injured and damaged in the sum of $350, which is the difference in value of said wire from that purchased, which they ask shall be recouped from the amount claimed by the plaintiff herein, and ask judgment herein against the plaintiff for said amount of $350, to be deducted from the amount claimed by the plaintiff herein, and the dismissal of said complaint with costs."

The plaintiff replied denying the allegations of the counterclaim, and subsequently applied for an order requiring the defendants to pay $598.11, on the ground that that sum

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was admitted by the answer to be due. The court granted such order, and the defendants duly excepted thereto.

Afterwards the defendants served an amended answer, in which, by way of counterclaim, they alleged that by reason of the breaches of warranty they were damaged (1) by being delayed and prevented from entering into in its season that branch of their business which consisted of dealing in fence wire, and by being otherwise injured in their business, in the sum of $650; (2) by the difference between the value of the said wire as purchased and the real value of the same as received and delivered, in the sum of $350. Other allegations of the amended answer will appear from the opinion.

Upon this answer the defendants moved to set aside the order requiring payment of $598.11 to the plaintiff. The motion was denied, and the defendant duly excepted.

This appeal is from the order requiring the payment and from the order refusing to set aside that order.

Charles M. Bice, for the appellants.

For the respondent there was a brief by *Finches, Lynde & Miller*, attorneys, and *B. K. Miller, Jr.*, of counsel, and the cause was argued orally by *Mr. B. K. Miller, Jr.*

Cole, C. J. The order requiring the defendants to pay $598.11, admitted to be due in the original answer, was fully authorized by sec. 2892, R. S. *Sellers v. Union Lumbering Co.* 36 Wis. 398. It seems to us too plain for argument that the answer admitted the plaintiff's claim to that extent to be just, therefore no further comment will be made on that point.

Assuming that this order was correctly made upon the pleadings as they then stood, was there any error in the refusal of the court to set it aside and allow the amended answer to be filed? We think not. Both the original and amended answer claimed damages for a breach of warranty in the quality of the wire, and on account of the looseness

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of the barbs on the same, in the sum of $350. But in the amended answer an additional claim for damages is set up, which is that by reason of the failure of the plaintiff to deliver to the defendants wire of the kind, quality and description agreed upon, the defendants were delayed and prevented from entering into that branch of business in its season, and were thereby injured in the sum of $650.

There is no allegation in either answer that the plaintiff undertook and agreed to deliver the wire in any specified time, nor does it appear when in fact it was delivered. Nor is there any averment that the plaintiff was informed, when the wire was ordered, as to what use it was to be put, or that the defendants purchased it for sale in their business. From the allegation in the amended answer that the defendants were engaged in the wholesale agricultural implement trade in the city of Milwaukee when the plaintiff's agent called at their place of business and took the order for the wire, it may be inferred the agent knew the business in which the defendants were engaged. But this is not enough. To lay the foundation for damages for loss in their business because defendants were prevented by the delay from entering into that branch of business in its season, it should distinctly appear that the special circumstances were communicated to the plaintiff's agent when the order was taken, and he was informed of the purpose for which the wire was purchased. Otherwise no damages could be recovered on that ground. This question is considered in the recent case of *Thomas, Badgley & Wentworth M. Co. v. W., St. L. & P. R. Co.* 62 Wis. 642, to which we refer for our views on this point. There were no facts stated in the amended answer which would sustain a claim for special damages on the ground that the defendants were injured in their business by reason of the failure of the plaintiff to deliver the wire as it had agreed to do. So, really, the amended answer contained no additional claim for damages which could be

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recovered in the action. It was therefore not error to refuse to allow it to be filed.

By the Court.—The orders of the county court appealed from are affirmed.

PLATTO, Appellant, vs. THE WESTERN UNION TELEGRAPH COMPANY, Respondent.

October 15—November 3, 1885.

APPEAL FROM J. P. *(1) Failure to bring to trial: Continuance for cause. (2) "Special order."*

1. If, at the second term after a justice makes return to an appeal, the appellate court continues the case over the term for cause, the appeal is saved, and thenceforth, as regards laches of the appellant, the case stands on the same footing as one originally brought in the appellate court.
2. The order for such continuance, whether formally written out on the record or not, is a "special order" within the meaning of sec. 3766, R. S.

APPEAL from the County Court of *Milwaukee* County.

This appeal is from an order of the county court dismissing an appeal by the plaintiff from the judgment of a justice of the peace, because the same was not brought to a hearing before the end of the second term after the return of the justice was filed in that court.

The appeal from the judgment of the justice was taken November 12, 1883; the return of the justice thereto was filed November 22d, and the cause was noticed by the plaintiff for trial at the December term, 1883, of the county court. Not having been tried at that term, the plaintiff again noticed it for trial at the March term, 1884. During the said March term, H. M. Finch, Esq., one of the attorneys of the defendant, died. Thereupon and because of his death the surviving members of the firm of which he

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was a member, or one of them, requested the plaintiff to join them in a stipulation that the cause be continued over that term. The plaintiff signed the stipulation, the same was filed, and the cause was continued accordingly. It was not again noticed for trial.

During the December term, 1884, on motion of the defendant, the appeal was dismissed for the reason above stated. Regular terms of the court were held in June and September, 1884.

J. V. V. Platto, appellant, *pro se.*

B. K. Miller, Jr., of counsel, for the respondent.

LYON, J. Unless the plaintiff's appeal from the judgment of the justice was properly dismissed under sec. 3766, R. S., the order of dismissal must be reversed. That section reads thus: "If neither party shall bring the appeal to a hearing in the appellate court before the end of the second term after filing the return of the justice therein, such court shall dismiss the appeal unless it shall continue the same by special order for cause shown."

What occurred at the first term after the justice filed his return to the appeal, that is, at the December term, 1883, is entirely immaterial. The proceedings in the cause at the second term thereafter, to wit, the March term, 1884, are alone important. At such March term a stipulation for a continuance over the term, signed by the attorneys for both parties, was filed. This of itself was good and sufficient cause for a continuance without reference to the reasons which prompted the attorneys to enter into the stipulation. But were it necessary to look behind the stipulation for cause of continuance, we find ample cause therefor in the sudden death during the same term of Mr. Finch, who seems to have had charge of the case for the defendant. The court continued the case, therefore, "for cause shown," and the record showed the fact when the appeal was dismissed.

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The order for such continuance, whether formally written out in the record or not, is a "special order" within the intent and meaning of the statute. Hence at the March term, 1884, the court did everything required by the statute to save the appeal, and its action in the premises is *res adjudicata* in the case. The court could not properly rule at a subsequent term that cause was not shown for a continuance over the March term, 1884; and if another special order to the effect that cause was shown was necessary to save the appeal, such order should have been made. We think, however, that one order in that behalf is quite sufficient, and we hold that if the appellate court at the second term after the justice makes return to an appeal continues the case for cause over that term, the requirements of the statute are complied with and the appeal saved. From thenceforth the case, as regards laches of the appellant, stands on the same footing as one originally brought in such appellate court.

If an order thus saving an appeal is not made at such second term, it must be obtained at a subsequent term, or the appeal will be dismissed. See *Holt v. Coleman*, 61 Wis. 422, and cases cited in the opinion.

By the Court.— The order of the county court dismissing the appeal is reversed, and the cause remanded for further proceedings according to law.

MEINERS, Appellant, vs. LOEB, Respondent.

October 15 — November 3, 1885.

Change of venue: Action commenced in wrong county.

Under sec. 2621, R. S., the right of the defendant to a change of venue when the county designated in the complaint is not the proper place of trial, is absolute if the demand and motion therefor are duly made. The court cannot retain the cause on the ground that the convenience of witnesses and the ends of justice would be promoted thereby. *Couillard v. Johnson*, 24 Wis. 588, overruled.

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APPEAL from the County Court of *Milwaukee* County.

The case is sufficiently stated in the opinion.

For the appellant there was a brief by *Markham & Noyes*, and oral argument by *Mr. Noyes*.

Leopold Hammel, for the respondent.

TAYLOR, J. This is an appeal from an order of the county court of Milwaukee county, changing the place of trial of the action from the county of Milwaukee to the county of Outagamie. The change was made on motion of the respondent, on the ground that he was a resident of Outagamie county at the time of the service of the summons and at the time of making the motion for a change of the place of trial. The action was on a promissory note. The defendant had demanded a change of the place of trial within the time prescribed by sec. 2621, R. S. 1878, and the plaintiff having declined to assent to such change within the time prescribed, the defendant made his motion for an order of the court changing the same, within the time also prescribed by said section, and the motion was granted.

The motion was resisted on the part of the plaintiff by reading an affidavit tending to show that the convenience of witnesses required that the place of trial should be retained in Milwaukee county. The plaintiff appealed from the order changing the place of trial, and alleges that the county court erred in not retaining the case in the county court of Milwaukee county, insisting that the affidavit of the appellant read in opposition to the motion shows that the convenience of witnesses and the ends of justice would be promoted by retaining the place of trial in Milwaukee county. In support of his contention he cites and relies solely upon the case of *Couillard v. Johnson*, 24 Wis. 533. That case differs from the case at bar in this respect: In that case, the court below refused to grant the motion to change the place of trial, because the convenience of wit-

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nesses and the ends of justice required that it should not be changed, and this court affirmed the order of the court below. In the case at bar, the court below granted the order against the opposition made on the ground of the convenience of witnesses. Notwithstanding the case of *Couillard v. Johnson*, the order of the court in this case should be affirmed, even had there been no change of the law upon that subject since that case was decided. The court below might well have overruled the objection to removing the case, for the reason that the plaintiff had not made a cross-motion to retain the same in the county court of Milwaukee county on the ground that the convenience of witnesses required its retention there, so as to enable the defendant to meet such objection to the removal by proofs on his part. Under the decision in *Couillard v. Johnson*, we think the court might use its discretion in that respect, and disregard the objection of the plaintiff to the removal upon that ground alone.

In *Veeder v. Baker*, 83 N. Y. 156, the court of appeals, speaking of the right of defendant to a removal of the case to the proper county, say: "The defendant in such case has the right to move for the change solely upon the ground that the proper county is not stated in the complaint, and if he can be met on the motion by affidavits showing that an impartial trial cannot be had in the county to which he demands the change, or that the convenience of witnesses or the ends of justice will be promoted by refusing the change, he may be taken by surprise, and cannot be prepared to meet such affidavits. Hence the orderly and regular practice is to order the change upon defendant's motion, and then, if the plaintiff desires to change to any other county on the ground stated in the last two specifications of sec. 987, he must make his motion upon affidavits which the defendant can be prepared to meet." The law in New York when this case was decided, was the same as

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the law of this state when *Couillard v. Johnson* was decided. But we think that sec. 2621, R. S., has changed the law as it stood when the decision in *Couillard v. Johnson* was made, and that a motion to change the place of trial to the proper county cannot now be met even by a countermotion to retain the case in the county where it was commenced on account of the convenience of witnesses.

It is the plaintiff's duty to commence the action in the proper county, and if he does not, it is his duty to consent to the change to the proper county when demanded by the defendant; and if he refuses to assent to such change when demanded, it is the duty of the court, on motion made within the proper time, to make an order changing the place of trial to the proper county. If we can give any force to the last sentence of said sec. 2621, we think it is very clear that the right to have the place of trial changed to the proper county is absolute when demanded and the motion to change is made within the time prescribed. The sentence referred to reads as follows: "The right to obtain a change of the place of trial by proceedings as aforesaid, shall not be affected by any other proceedings in the action." This sentence is new, and was not the law when *Couillard v. Johnson* was decided. A motion to remove the place of trial for the convenience of witnesses, or to retain the action in the county where the action is commenced for that cause, is clearly a proceeding in the action within the meaning of the language quoted.

We think the case of *Couillard v. Johnson* should not be followed under the present law, and that the right to remove the action to the proper county is absolute in cases originally commenced in courts of record, as well as in cases of appeal from justices' courts. Under sec. 2624, R. S., it was held by this court that the right to change the place of trial was absolute, and could not be defeated on the ground that the convenience of witnesses required that

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it should be retained in the county where the action was commenced. *Van Kleek v. Hanchett*, 51 Wis. 398; *Woodward v. Hanchett*, 52 Wis. 482, 487.

It is true that in sec. 2624 the word "shall" is used instead of the word "may," in sec. 2622. But when sec. 2622 is read in connection with sec. 2621, it is evident that the word "may" in sec. 2622, as applied to removals for the reason that the county designated in the complaint for the place of trial is not the proper county, is equally mandatory as the word "shall," in sec. 2624.

By the Court.— The order of the county court is affirmed, and the cause is remanded for further proceedings.

CLEVELAND and others, Appellants, vs. BURNHAM, imp., Respondent.

October 16 — November 3, 1885.

(1) Appeal to S. C.: Inferences from findings. (2) Mistake in Christian name how proved and corrected. (3-5) Banks and banking: Liability of stockholder for debts: Transfer of stock on books: Evidence of transfer when books lost: Presumptions. (6) Interest. (7) Costs.

1. When all the facts essential to constitute a mistake are found by the trial court, this court may draw therefrom the inference that there was a mistake, although the evidence is not before it and the trial court did not specifically so find.
2. A mistake in the Christian name of a grantee or person to whom any instrument is made, may be proved by parol and corrected in any action legal or equitable.
3. To render a purchaser of stock in a bank liable to the amount of his shares for the debts of the corporation (under ch. 71, R. S. 1858), a formal transfer of such shares to him upon the books of the bank must be shown.
4. *It seems* that if the books of the bank are lost or destroyed any record or document in connection with or having reference to such transfer, and contemporaneous therewith, would be higher evidence of the entry thereof in such books than mere parol testimony.

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5. Thus, in such a case, the certificate of stock issued to the transferee, or the copy of the list of shareholders filed (under sec. 31, ch. 479, Laws of 1852) with the register of deeds, would be *prima facie* evidence of the entry of the transfer upon the books. The presumptions are that the statute requiring such entry before the issue of a new certificate, was complied with, that the usual course of business was followed, and that everything was done which was essential to vest the title in the purchaser who is in possession of the stock certificate.
6. The liability of the stockholder to the amount of his shares becomes fixed at the date of the judgment by which it is ascertained that the assets of the bank have been exhausted and that the deficiency exceeds the amount of his stock, and from that date he is liable also for interest on that amount.
7. A judgment fixing the amount of the claims of creditors of a bank, applying the assets in part payment thereof, and adjudging the stockholders liable to the amount of their stock respectively, was vacated as against a stockholder who had failed to answer, and he was let in to defend. In a judgment subsequently rendered against him he was charged with the costs only from the time of serving his answer. *Held*, not error.

APPEAL from the County Court of *Milwaukee* County.

The action was commenced in 1862 against the Marine Bank of Milwaukee as an insolvent corporation, and the other defendants as its stockholders, to enforce their liability under the statute. The reports of former appeals in the course of the litigation will be found in 14 Wis. 705; 17 id. 545; 18 id. 490; 55 id. 387, 598; and 60 id. 16.

On April 27, 1869, it was adjudged that the defendant bank had surrendered its corporate rights and franchise and that it be dissolved.

On November 21, 1881, judgment was entered, adjudging the amount of the indebtedness to the several plaintiffs, applying the assets of the bank to the extent thereof in the satisfaction of such indebtedness, and further adjudging the several defendants, including the defendant *Burnham*, liable to the plaintiffs in the amounts of the stock of the bank held by them respectively. After the decision in 55 Wis.

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598, the judgment was vacated as to the defendant *Burnham*, against whom it had been taken by default, and he was allowed to answer.

The amended complaint alleged that *Burnham* was a stockholder at the time of the accruing of the indebtedness to the several plaintiffs, and also at the time of the commencement of the action, in the amount of $5,000. The answer of *Burnham* was served April 24, 1883, and denies, among other things, that he was the owner of stock to the amount of $5,000.

The findings of fact and the conclusion of law as to the ownership of stock by *Burnham* are stated in the opinion. The court also found as conclusions of law that *Burnham* was liable to the plaintiffs in the sum of $3,000, with interest from the date of the trial, February 18, 1885, and that he cannot be charged with interest prior to that date; that he was to be charged with the costs which had been incurred by the plaintiffs against him in the action subsequent to the service of his answer and no more.

From the judgment entered accordingly the plaintiffs appealed.

For the appellants there was a brief by *E. Mariner* and *Geo. H. Noyes*, and oral argument by *Mr. Noyes*. They argued, among other things, that the court should have ordered judgment against the defendant for interest on the stock held by him, from the commencement of the suit, or from the date of the judgment in the action, or at least from the time when issue was joined by the answer of *Burnham*, on April 24, 1883. *Burr v. Wilcox*, 22 N. Y. 557; *Handy v. Draper*, 89 id. 334; *Shellington v. Howland*, 53 id. 371; *Wheeler v. Millar*, 90 id. 362–3. Costs should have been allowed from the commencement of the suit to the extent to which they were incurred by the plaintiffs in the proceeding to declare a final judgment against *Burn-*

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ham. See *Crease v. Babcock*, 10 Met. 525, 568; *Coleman v. White*, 14 Wis. 703.

Winfield Smith, for the respondent, contended, *inter alia*, that without a transfer to the defendant on the books of the bank, he cannot be treated as a stockholder in this action. *Rosevelt v. Brown*, 11 N. Y. 152–3; *Cady v. Potter*, 55 Barb. 463; *Ex parte Hall*, 1 Macn. & G. 307; *Mann v. Currie*, 2 Barb. 299; *U. S. v. Cutts*, 1 Sumner, 133, 139; *Bruce v. Smith*, 44 Ind. 5; *Hoare's Case*, 2 Johns. & Hem. 229; *Upton v. Burnham*, 3 Biss. 431; *Johnson v. Laflin*, 5 Dillon, 78–83, 90; *Helm v. Swiggett*, 12 Ind. 194; *Marlborough Co. v. Smith*, 2 Conn. 579; *Humble v. Langston*, 7 Mees. & W. 517; *Shellington v. Howland*, 53 N. Y. 371, 376; *Bosanquet v. Shortridge*, 4 Exch. 699; *Ward's Case*, L. R. 2 Ch. App. Cas. 431; *Head's Case*, L. R. 3 Eq. 84; *White's Case*, id. 86; *Bugg's Case*, 2 Drewry & Sm. 452; Bouvier's Law Dict. tit. STOCKS; *Union Bank v. Laird*, 2 Wheat. 393; *Black v. Zacharie*, 3 How. 483; *Kellogg v. Stockwell*, 75 Ill. 68; *Bank of America v. McNeil*, 10 Bush, 54; *Conant v. Seneca Bank*, 1 Ohio St. 298; *U. S. v. Vaughan*, 3 Binn. 394; *Beckwith v. Burrough*, 13 R. I. 294. Interest should not be allowed beyond the date of the decision of this issue. The judgment should in no case exceed the total amount of the defendant's stock. The interest in favor of the original creditors is a part of the debt, and must be restricted by the same limitations which control the collection of the principal. *Crease v. Babcock*, 10 Met. 525, 568; *Cole v. Butler*, 43 Me. 401, 405; *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. 225, 233; Thompson's Liability of Stockholders, sec. 364, note 3. There was no error in the ruling as to costs. The suit is naturally divided into two parts, (1) that in which the plaintiffs establish their claims against the bank and obtain judgment for principal, interest, and costs; and (2) that in which the liability of the stockholders is fixed. The costs

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charged against the bank are not chargeable to *Burnham* as personal costs, but as part of the bank debt. He should at most pay the costs of the issue he has made. It appears by the record that, besides the costs awarded by the court against *Burnham*, he paid at the time of answering all the costs previously accrued against him. The court could not compel him to pay them a second time.

ORTON, J. On the 21st day of November, 1881, a judgment was entered in the above-entitled action in favor of the plaintiffs severally, for the sums of $18,060.59, $17,509.40, and $28,637.80, against the defendant the Marine Bank of Milwaukee. At that time all the assets of said bank had been collected by a receiver and converted into money, and the net proceeds thereof amounted only to the sum of $4,337.25, which by said judgment was applied in part payment thereof, and of the said claims of the plaintiffs, proportionably, leaving a large deficiency in their favor against the bank and over and above the total amount of the stock held therein by the stockholders thereof. In this branch of the case against the defendant *Jonathan L. Burnham* there was no contest as to the fact that he was the owner of at least $3,000 of stock in said bank, and there was no question but that he was liable to the plaintiffs for such amount. The main contention was that he was not the owner of certain other $2,000 of said stock, and liable therefor, as charged in the complaint. In respect to this stock the county court found, as facts, that the said *Burnham* agreed to purchase of Silkman & Field $2,000 of stock owned by them, and paid therefor in brick, which was used in a building they were constructing; that Silkman & Field and said *Burnham* went to the bank in order to transfer said $2,000 stock to said *Burnham*, and thereupon the said Silkman & Field delivered their certificate for said $2,000 stock to said bank, which executed a certificate for $2,000 of its stock

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and delivered it to said *Jonathan Burnham.* Said certificate was in the usual form of the stock certificates of said bank, and in the space left therein for the stockholder's name the said bank inserted the name of *George* Burnham and delivered it to *Jonathan L. Burnham*, who expected at the time that his own name would be inserted therein, and took the certificate away, and has ever since retained it, and did not discover that it was so made out in the name of *George* Burnham until after the judgment was entered in this case on November 21, 1881; that said George Burnham never purchased or paid for said $2,000 of stock, or any stock in said bank; never held or knew of said certificate, or made any claim on the same or the shares of stock represented thereby; that said defendant *Jonathan L. Burnham* never sold or transferred the stock so agreed to be purchased as aforesaid by him of Silkman & Field, but held the same right and title, if any, to the same at the commencement of this action as at the time of receiving said certificate of $2,000. It does not appear that the defendant *Burnham* ever drew any dividend upon said stock, nor that any dividend was ever paid to any stockholder of said bank, nor does it appear that he performed any act of ownership beyond what appears above, save that he attended a stockholders' meeting and voted on some stock, but whether he ever voted upon any stock beyond the said $3,000 does not appear.

It was further found that on the 5th day of July, 1859, there was filed in the office of the register of deeds of Milwaukee county, a statement signed and verified by the oaths of the then president and cashier of said bank, purporting to give a true and correct list of the names and residences of the shareholders in said bank, and the number of shares and amount of stock owned by each on the 1st day of July, 1859. The said statement is as follows, to wit: "The following is a statement of the names of the shareholders of the Marine

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Bank of Milwaukee, together with the residence and number of shares owned by each stockholder on the first Monday of July, 1859, a banking association organized under an act of the legislature of the state of Wisconsin, entitled 'An act to authorize the business of banking,' approved April 9, 1852, and made in pursuance of the thirty-first section of said act," which said statement recited, among others, the name of *Jonathan L. Burnham* as a shareholder in the amount of $5,000, and in which neither the names of George Burnham nor those of Silkman & Field appear, and was the last statement filed in said register's office by or on behalf of said defendant bank, and *Jonathan L. Burnham* never had any other stock than such $3,000, and $2,000 agreed to be purchased from said Silkman & Field. The stock and transfer and other books of said bank, and the records thereof, have been lost, and the same could not be produced upon the trial of this action, and it does not further appear what entry, if any, of such transfer by Silkman & Field was made upon the books of such bank.

The conclusion of law upon these facts is "that *Jonathan L. Burnham* is not the holder of the stock in said bank represented by said certificate so made out in the name of George Burnham, which he, the said *Jonathan*, received, and is not liable in this action as the holder thereof." This conclusion of law is preceded by the conclusion of fact "that the attempted transfer of said $2,000 stock by said Silkman & Field was not completed, and did not transfer the title thereto to the defendant *Jonathan L. Burnham*." The evidence is not reported, and the case is to be heard and disposed of upon the above findings of fact alone.

A preliminary question is raised by the learned counsel of the respondent, whether any inferences or conclusions can be drawn by this court from said facts beyond what are expressed in and by the facts themselves. If this court cannot be allowed to draw any reasonable inferences and log-

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ical conclusions which the facts found by the county court may warrant, then it has really nothing to do with the case, and the conclusions of both law and fact made and filed by the county court are conclusive. We had supposed that the object of an appeal to this court, in such a case, was to obtain a reversal of the conclusions of law drawn by the court below from the facts, whether such facts appeared merely from the evidence, or by the findings of the court. The county court found a conclusion of fact, from the facts stated, "that the attempted transfer of said $2,000 of stock was not completed, and did not transfer the title thereto to the defendant *Jonathan L. Burnham*, and that he is not the holder of the stock," etc. This conclusion is what the appellant seeks to reverse, and it presents the only important question arising from the facts found, to be decided by this court. The contention that this court cannot draw its own inferences and conclusions from the facts on such an appeal is too technical to be even specious or plausible.

The learned counsel further contends that the facts cannot be considered as proof that the stock certificate issued by the bank in the name of George Burnham instead of *Jonathan L. Burnham* was so made by *mistake*, and that such mistake cannot be corrected in such an action so as to make said certificate any evidence of the title of *Jonathan L. Burnham* to said stock. There is no principle better settled than that when a grant or any instrument is made to a person by a wrong *Christian* name, either by mistake or fraud, it may be proved by parol and corrected in any action, legal or equitable. In *McMahon v. McGraw*, 26 Wis. 614, in an action of ejectment, the legal title was held by a tax deed taken by and in the name of the defendant. The plaintiff was allowed to prove, without pleading it, that the defendant took the title when agent for the plaintiff, and in violation of his trust, and that, therefore, it inured to the benefit of the plaintiff. In *Staak v. Sigelkow*

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12 Wis. 234, it was shown, in a suit for the title and possession, that a certain deed was executed by mistake to *Louis*, instead of the correct Christian name, *Arnold*, Staak, by proof that he was the purchaser. In that case the learned counsel of the appellant therein, Messrs. Smith & Solomon, cited many cases where such a mistake might be corrected in the same action involving the title, and Chief Justice DIXON, in his opinion, examined the question very fully, and cites numerous cases at law as well as in equity where such a mistake was allowed to be corrected by parol evidence, and in illustration of the maxims *ambiguitas verborum latens verificatione suppletur*, and *nil facit error nominis cum de persona constat*, he cites cases all along back to *Counden v. Clerke*, Hob. 32; Bac. Max. 23; *Altham's Case*, 8 Rep. 155; Brooke's Abr. CONFIRMACION, 30; Id. NOSME, 9; and Coke *super* Litt. 3.

In *Bancroft v. Grover*, 23 Wis. 463, a note wrongly described in an award of arbitrators as having been given to the wrong person was allowed to be corrected by parol evidence. In *Begg v. Begg*, 56 Wis. 534, in an action of ejectment, parol evidence was held admissible to show whether the grant was intended to be made to James Begg, Jr., or James Begg, Sr. *In the Goods of Brake*, 32 Eng. Rep. 601, parol evidence was allowed to prove whether *William* McC. or *Thomas* McC. was intended as the executor by the testator in his will. In *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158, a bequest made to S. G., son of Capt. J. F. S., was intended to be made to S. G., son of Capt. J. F. H., and it was allowed to be shown by parol evidence; and so, in *Careless v. Careless*, 1 Mer. 384, where the bequest was made to the testator's nephew Robert, the son of *Joseph* C., it was allowed to be shown that his nephew Robert, the son of *Thomas* C., was intended, and that Joseph was written instead of Thomas "by the slip of the pen." *Beaumont v. Fell*, 2 P. Wms. 141, was one of the first cases in which

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parol evidence was admitted in aid of construction, and in it the doctrine is laid down that whenever the testimony raised an ambiguity, evidence *dehors* the instrument should be received to show what the words used really and in fact meant. See, also, *Maund's Adm'r v. McPhail*, 10 Leigh, 199; *Hiscocks v. Hiscocks*, 5 Mees. & W. 363. There is no difference between the application of this principle to wills and to contracts. 1 Greenl. Ev. § 287. Such mistakes are classed as *latent* ambiguities, to be explained by parol. 1 Greenl. Ev. § 297.

In reason, why should not such a mistake be corrected or explained in any action by parol evidence? Where no rights have grown up under it, and the party whose name is wrongly inserted claims nothing by it, and never had any interest in the subject matter, and there are no innocent parties to suffer by the correction, why should not the insertion of the wrong Christian name in such a document be treated as a mere clerical error, and have effect as corrected, or the error be disregarded? Where any claim is made by the person whose name is so inserted, and any vested interests are to be disturbed, and there is any doubt about the mistake, then it would be proper to file a bill in equity to make the correction, and make the parties interested, parties.

In this case the stock was bought and paid for by *Jonathan L. Burnham*, and he went to the bank with those from whom he purchased it, to have it transferred upon the books to him, and by a mere clerical error of a clerk in the bank the name of *George* was inserted as *his* Christian name, and the certificate is delivered to him and has been kept by him as the owner of it for a great many years, and no other person has ever set up any claim to it, and the statement of the bank officers filed with the register of deeds shows that the stock represented by it stands in his name on the records of the bank. The stock certificate was issued and delivered to

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him by the name of George Burnham, perhaps under the mistaken belief of the clerk that such was his true name. The facts found, without further repetition, show a clear and unquestionable case of a mistake in the Christian name of *Jonathan L. Burnham* in the stock certificate introduced in evidence, by the use of the name of "George" instead of "Jonathan," and the evidence is beyond all question that the certificate is his; and with such clear evidence of the mistake it should have effect as evidence of his title to the $2,000 of stock. It is true that the county court failed to find that there was any *mistake* in such name, and it is insisted that this court can go no further than the findings. But where the county court found all of the essential facts to constitute this mistake, we shall not hesitate to name it, and give it its true legal character and effect.

So far, then, there are established the two important facts, so far as the action of the bank is concerned, that Silkman & Field surrendered and delivered to the bank their certificate for this $2,000 of stock, and the bank issued to the defendant *Jonathan L. Burnham* a certificate of the same. The statement of facts does not directly show what entry or entries, if any, were made of the transfer of this $2,000 of stock on the books of the bank. The books are lost, and of course cannot be consulted. After so long a time it would be scarcely possible for any person who made such entry, or saw the same on the books, to now testify to the same from mere recollection. Such testimony, if given, would be of the most suspicious and unreliable character. In view of the authorities we think it safer to hold that such transfer on the books of the bank should be shown. What would be the best or primary evidence of such transfer is lost, and resort must be had to secondary evidence of the highest class to prove such fact. Such secondary evidence is of the highest class when it does not appear that there is any better secondary evidence available. 1 Greenl. Ev.

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§ 84. The testimony of a witness that he could recollect so long afterwards that he made or saw such entry on the books of the bank would be the weakest kind of oral evidence, and yet it would be proving the contents of the bank book or record, and as a general rule such evidence is the best next to the production of the books themselves. But the circumstances, as we have seen, may make such evidence very uncertain and unsatisfactory, if not from lapse of time impossible. In order to render such evidence indispensable, it must appear that it is attainable; that some person may be found who recollects making or seeing such entry on the books, and such fact does not appear in this case.

But there is in the case documentary evidence which is higher than *oral* testimony, tending to show that such transfer was made on the books of the bank. The stock certificate of Silkman & Field was evidently surrendered and canceled for the purpose of having such transfer properly made on the books, and a new stock certificate therefor was duly issued to *Jonathan L. Burnham*, who had purchased the stock from Silkman & Field. This is documentary evidence tending strongly to show that the transfer had been lawfully consummated. This is a regular and an official document of the bank, and is at least *prima facie* evidence of the title of said *Jonathan L. Burnham* to this stock.

By the thirty-first section of the banking law of 1852 [ch. 479, Laws of 1852] it is provided that "the president and cashier of every association formed pursuant to the provisions of this act shall at all times keep a true and correct list of the names of all the shareholders of such association, and shall file a copy of such list in the office of the register of deeds of the county where any office of such association may be located, and also in the office of the bank comptroller on the first Monday of January and July in each year." The copy of the statement or list so required to be kept, which was verified by the oaths of the president and

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cashier, and filed with the register of deeds of Milwaukee county on the 5th day of July, 1859, showing the names of the shareholders of said bank, and the amount of stock owned by each on the first day of July, 1859, was introduced in evidence. This was also an official document of the officers of said bank. It showed that *Jonathan L. Burnham* was the owner at that time of $5,000 of stock in said bank. In connection with this document it was shown that said *Burnham* never had been the owner of any of the stock of said bank except his original subscription of $3,000 and the $2,000 so purchased from Silkman & Field, and their names did not appear upon said list as the owners of any shares of said stock. This would seem to show, *prima facie* at least, that the transfer of said stock appeared upon the books of the bank in some form of record.

By the banking law stock was made transferable on the books of the association "in such manner as may be agreed on in the articles of association." It may be that no special manner of such transfer was ever agreed on in the articles of association, or that the surrender and cancellation of the stock of the original owner, and the issuing of a new stock certificate to the purchaser or transferee, and the entry upon the list of shareholders of said stock in the name of such purchaser, was the manner of transfer on the books so agreed upon. But be that as it may, the said documents, in connection with the parol evidence, certainly constituted the best evidence of such transfer upon the books which was available to the plaintiffs in this case, and was much better and higher evidence than simply the parol evidence of any person swearing to his recollection, after so long a time, of the entry having been made, or of the contents of the books in respect to such entry. 1 Greenl. Ev. § 88, and cases cited in note. When the record books are destroyed or lost, then it would seem, if there existed any record or document in connection with or having reference to such

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transfer, and contemporaneous therewith, it would afford higher evidence of the entry thereof in such books than mere parol testimony. *Hilts v. Colvin*, 14 Johns. 182; *Battles v. Holley*, 6 Greenl. 145; *Cook v. Wood*, 1 McCord, 139; *Lyons v. Gregory*, 3 Hen. & M. 237; *Lowry v. Cady*, 4 Vt. 504; *Doe v. Greenlee*, 3 Hawks, 281; *Collins v. Maule*, 8 Car. & P. 502; *Everingham v. Roundell*, 2 Moody & R. 138; *Harvey v. Thomas*, 10 Watts, 63; 1 Greenl. Ev. § 85, and notes; Gilb. Ev. 5. The rule in such a case is also that a certified copy or transcript, required to be kept, may supply the record. We think it within the rule that these documents, which so closely relate and have reference to the transfer on the books of the bank, in a proper manner, of this stock, are at least *prima facie* evidence of such transfer. But, in addition to this, there are certain presumptions which arise in such a case: (1) That the requisites of the statute requiring an entry on the books of transfers of stock have been complied with before issuing the new certificate and entering the name of the transferee as the owner upon the list of shareholders with the amount of such stock. 1 Greenl. Ev. § 38. (2) That such entry was made because in the usual course of business of the bank. *Ibid.; Boorman v. Am. Exp. Co.* 21 Wis. 152. (3) The possession of the stock certificate, and the purchase of the stock and payment of the consideration, are presumptive evidence of his full title thereto, and that everything had been done which the law required to be done to transfer the same. 1 Greenl. Ev. § 46, and numerous cases cited.

Without pursuing this question further, we conclude that there was *prima facie* evidence that said stock was duly transferred on the books of the bank to *Jonathan L. Burnham*, and that he is the owner and holder thereof.

The learned counsel of the respondent contends that there can be no interest allowed in the judgment beyond the amount of the defendant's stock of $5,000 or $3,000, as the

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case may be. That question has been determined in respect to the penalty of a bond, in an action against sureties which involved the same principle, by this court in *Clark v. Wilkinson*, 59 Wis. 543, and it was held that "the authorities in this country establish the doctrine that when the damages resulting from the breaches of the bond exceed the penalty, interest on the amount of the penalty may be recovered from the time of the breach in excess of the penalty." This was so determined upon general principles of law. The time from which interest should be computed in such a case has not before been determined by this court. In the above case it is stated, in the opinion of Mr. Justice TAYLOR, that it had been decided in New York that interest may be recovered from the date of the breach of the bond, if the damages then exceed the penalty. The case referred to is *Brainard v. Jones*, 18 N. Y. 35. In that case interest was so allowed by authority, and upon the general principle "that such is what the law exacts of a person for his unjust delay in payment after his liability is ascertained and the debt is actually due from him." That would seem to be the correct rule, and as the question is one of conflicting authority, we choose to concur with the courts of New York upon it. This seems to be also in consonance with our statute, and the general rule adopted by this court in cases where no interest is stipulated in the contract beyond maturity, that interest should be computed upon any such debt from the time it becomes due. *Mills v. Jefferson*, 20 Wis. 50. In accordance with that principle the liability of the defendant as a stockholder to the plaintiffs became fixed and certain, and his indebtedness to them became liquidated and due, from the date of the judgment by which it was ascertained that the assets and property of the bank had been exhausted and the indebtedness of the plaintiffs or the balance of the judgment exceeded the amount of the defendant's stock. From the date of said judgment the defendant

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was liable to pay at once to the plaintiffs or into court an amount equal to his said stock of $5,000. That date appears to be November 21, 1881.

The costs allowed in the court below seem to be according to the better rule, and we are not disposed to disturb the same.

This disposes of the questions in controversy on this appeal. I regret that this opinion is so long, but the questions are important, and it was desirable that their decision should be right and supported by reason and authority.

By the Court.—The judgment of the county court is reversed, and the cause remanded with directions to render judgment in accordance with this opinion.

GILL and another, Respondents, vs. BENJAMIN, Appellant.

October 16—November 3, 1885.

Sale of chattels: Severable contract: When title passes: Loss before measurement.

G. agreed to sell and deliver to B. 1,000 cords of wood "to be delivered from G.'s pier [in Michigan] over the rail of the vessel . . . and to be delivered from time to time to B.'s vessel as wanted during the season of navigation; said wood to be piled as taken from vessel, and to be measured and paid for when piled on B.'s dock in Milwaukee." A cargo of the wood was lost after delivery over the rail of B.'s vessel at G.'s pier. In an action by G. to recover therefor at the contract price, *held:*

(1) Though the contract was executory when made, yet as each cargo was delivered on board B.'s vessel, the contract as to such cargo became an executed sale, and the title to such cargo vested at once in B. although it was not to be paid for until piled and measured on his dock.

(2) The piling and measurement having been rendered impossible, if not through B.'s fault, by the act of God, B. must pay for the cargo lost.

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APPEAL from the County Court of *Milwaukee* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

The plaintiffs were engaged in the business of furnishing wood by contract at Gill's Pier, Michigan. The defendant was a wood and coal dealer at Milwaukee. March 1, 1884, the plaintiffs sent to the defendant the following written proposition, which was accepted in writing by the defendant, as follows:

"GILL'S PIER, MICH., March 1, 1884.

"*H. M. Benjamin, Milwaukee, Wis.*

"DEAR SIR: We will sell and deliver to you one thousand cords maple wood, to be delivered from Gill's Pier, Leelenaw county, Mich., over the rail of the vessel, at three dollars and twenty-five cents ($3.25) per cord; all the wood to be sound, body, marketable, maple wood, and to be delivered from time to time to your vessel as wanted during the season of navigation of 1884. The said wood to be piled as taken from vessel, and to be measured and paid for when piled on your dock in Milwaukee, Wis.

"Yours respectfully,

"WILLIAM GILL & SON."

"I accept the above.

"*Milwaukee, March 10, 1884.* H. M. BENJAMIN."

The undisputed evidence was to the effect that the captain of the schooner Surprise, a vessel owned by the defendant, took the first cargo of wood from the plaintiffs' pier on June 30, 1884, and at various times thereafter chartered certain other vessels to transport cargoes to the defendant's dock in Milwaukee; that there were in all, aside from the one in dispute, six of these cargoes, aggregating 833¾ cords of wood, which were loaded at Gill's Pier, carried across Lake Michigan, unloaded, assorted, piled, and measured on the defendant's dock at Milwaukee, and then paid for; that two of the six cargoes were delivered and received after

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October 7, 1884; that the defendant paid the freight for such transportation, and the expense of unloading, culling, and piling the wood, and part of the expense of measuring; that the plaintiffs paid the expense of placing the wood over the rail of the vessel at their pier, and employed and paid one Saveland, residing at Milwaukee, as their agent in doing whatever was necessary to be done in such measurement, and sending a statement thereof to the plaintiffs; that in the six cargoes so delivered twenty-six cords were treated as culls, and paid for at a less rate than the contract price; that good sound, marketable maple wood could be culled; that the per cent. of culls in the six cargoes mentioned was very small — unusually so; that the defendant always dealt fairly about culling wood; that the J. E. Bailey, chartered by the captain of the Surprise for that purpose, was present at Gill's Pier, Michigan, October 7, 1884, to get a cargo of wood for the defendant under the contract, when the plaintiffs delivered over the rail of the Bailey at that place 155 cords of "good sound, marketable, body maple wood, sawed ends," aside from the wood hereinbefore mentioned, which 155 cords of wood the vessel's crew, and the men they hired, piled and stowed on the Bailey; that the last was put on board about half past six in the evening of October 7, 1884; that the 155 cords did not constitute a full cargo for the Bailey, as she was capable of carrying 195 to 200 cords of such wood; that the captain thereof gave the plaintiffs a receipt therefor a day or two after in these words:

"GILL'S PIER, MICH., October 7, 1884. Shipped in good order and condition, by *William Gill & Son*, at the risk of whom it may concern, on board the J. E. Bailey, whereof Berenson is master, now in port at Gill's Pier, bound for Milwaukee, Wis., 155 cords maple wood. HENRY BERENSON."

The night after the wood was so put on board the Bailey it began to rain quite heavily and the wind blew, and the

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next morning the Bailey was ashore, and the 155 cords of wood was partly washed overboard, and the balance thrown overboard by those in charge of the vessel, and became a total loss. The captain thereupon telegraphed the defendant to the effect that the schooner Bailey was ashore with 155 cords of his wood. The plaintiff admitted that the wood placed on the Bailey was of the same kind and character in general as the other wood delivered, except the latter had a part cargo of dry wood.

This action is to recover for the 155 cords of wood at the contract price, and interest from November 1, 1884. Upon the facts stated the court directed a verdict for the plaintiffs, and from the judgment entered thereon the defendant appeals.

For the appellant there was a brief by *Markham & Noyes*, and oral argument by *Mr. Noyes*. They contended, *inter alia*, that the defendant was not liable because (1) by the express terms of the contract the wood was not to be paid for until it was piled and measured on defendant's dock. *Buffalo v. O'Malley*, 61 Wis. 257. (2) By the practical construction given to the agreement by the course of dealing between the parties, the price was not to be paid until the wood was culled in the usual way and the amount thereof answering to the kind and quality contracted for ascertained. (3) Until the culling, piling, and measurement of the wood on defendant's dock it could not be told how many cords of sound, body, marketable, maple wood was contained in the amount placed on the Bailey. (4) The title to the wood in question would not pass to the defendant until he had had an opportunity to inspect the wood and accept it as of the kind and quality contracted for. *Cooke v. Millard*, 65 N. Y. 369; *Bacon v. Eccles*, 43 Wis. 237; *Hoffman v. King*, 58 id. 317. (5) The plaintiffs did not put over the rail of the Bailey a vessel load, as their contract required them to do, and the defendant was not bound to

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accept any less than a full cargo. Benj. on Sales, secs. 689, 690, 589 and note; *Barton v. Kane*, 17 Wis. 37–44. (6) The wood had not been *specifically identified* in the manner specified in the contract or according to the usual course of business under the same. *Winslow v. Leonard*, 24 Pa. St. 14; 62 Am. Dec. 357; Story on Sales, sec. 296; *Galloway v. Week*, 54 Wis. 608; *Hahn v. Fredericks*, 30 Mich. 225–6; *Wilkinson v. Holiday*, 33 id. 387. (7) Something remained to be done by the seller to the property after loading the vessel, to wit, to specify the property contracted for by assorting, piling, and measurement, and until that was done the title would not pass, and the wood would remain at the risk of the plaintiffs. Story on Sales, secs. 296–8; *Pike v. Vaughn*, 39 Wis. 499, 505; *Lingham v. Eggleston*, 27 Mich. 324.

J. E. Wildish, for the respondents, argued, among other things, that if property is *delivered*, the transfer of the control and dominion to the vendee shows an intention to pass the title, though something remains to be done to ascertain the price, and therefore the right of property passes. *Macomber v. Parker*, 13 Pick. 175; *Riddle v. Varnum*, 20 id. 280; *Olson v. Mayer*, 56 Wis. 557. The place of delivery was named in the contract, and it was the defendant's business to have his proper agent to receive the wood at that place, and he is now estopped to deny the authority of his agent, the captain, to receive and accept the wood. If the captain had any instructions to the contrary the plaintiffs are not bound thereby. *Kasson v. Noltner*, 43 Wis. 650; *Bouck v. Enos*, 61 id. 660; *Beaty v. Doggett*, 51 id. 231. The wood was received on board without objection as to kind or quality, and such objection cannot now be raised. A small amount of unmerchantable wood mixed in would not be a reason for non-acceptance. *Nisbet v. Gill*, 38 Wis. 657. The general rule is that property placed in the hands of the carrier becomes at once the property of the consignee.

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Ranney v. Higby, 4 Wis. 154; *Krulder v. Ellison*, 47 N. Y. 36; *People v. Haynes*, 14 Wend. 546; Addison on Cont. sec. 587.

CASSODAY, J. The facts are undisputed. Does the law put the loss of the 155 cords of wood upon the plaintiffs or the defendant? The contract when made was executory. The plaintiffs thereby agreed to sell and deliver to the defendant 1,000 cords of wood. The wood was to be of the kind and quality named in the contract. No particular 1,000 cords of wood was then designated nor described therein. It was all "to be delivered from Gill's Pier . . . over the rail of the vessel." In was, moreover, "to be delivered from time to time" at that place, "*as wanted*, during the season of navigation of 1884." The Bailey was chartered by the captain of the defendant's vessel, and for the purposes of the contract must be regarded the same as though it were the property of the defendant. True, each cargo was "to be piled on the defendant's dock in Milwaukee" as taken from the vessel, and to be measured and paid for at the price named when so piled. This raises the question whether, by the terms of the agreement, the title of each cargo became vested in the defendant when delivered to and "over the rail of the" *defendant's vessel* at Gill's Pier, or remained vested in the plaintiffs while being carried across the lake on the defendant's vessel, and until taken from his vessel and piled on his dock in Milwaukee. If the title to each cargo remained vested in the plaintiffs until piled on the defendant's dock in Milwaukee, then did it continue to be vested in them until measured? and if until measured, then did it remain vested in them until paid for? The piling on the dock was apparently to facilitate the measurement, and the measurement was apparently to ascertain the amount to be paid. But can it be that the title of a cargo so piled upon the defendant's dock and measured did

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not become vested in the defendant until he had paid for it? And if it became vested in him before he paid for it, then why not before it was measured or piled on his dock or taken from his vessel?

The words "sell and deliver *to you* . . . from Gill's Pier, . . . over the rail of the vessel," clearly designated that as the place of delivery. On the delivery of any cargo being made in that way at that place, the possession of *such cargo* was manifestly intended by the contract to immediately pass entirely from and beyond the control of the plaintiffs into the absolute and exclusive possession and control of the defendant. The vessel upon which such cargo was so placed belonged to the defendant, and was controlled by his captain; or else the vessel was chartered by his captain for his service in the transportation of such cargo, and hence was, so far as the contract was concerned, his vessel for that voyage for the purposes of such transportation. The plaintiffs had no control over the management of the vessel, nor the direction in which it should go, nor the port at which it should land. The contract, though executory when made, yet as it contemplated a delivery from time to time, as wanted, in *separate* cargoes, each of which was to be paid for as indicated, it was clearly severable. *Scott v Kittanning Coal Co.*, 89 Pa. St. 231; *Goodwin v. Merrill*, 13 Wis. 737; *Sawyer v. C. & N. W. R. Co.* 22 Wis. 385. This being so, it necessarily follows that, as each cargo was delivered on board the defendant's vessel, the contract as to such cargo became an executed sale, so far as the plaintiffs were concerned, unless the mere fact that their man was expected to participate in the measurement of such cargo when piled on the defendant's dock prevented the title to such cargo from becoming vested in the defendant until so measured. *Morrow v. Reed*, 30 Wis. 81; *Morrow v. Campbell*, 30 Wis. 90; *Fletcher v. Ingram*, 46 Wis. 191; *Scott v. Kittanning Coal Co. supra.*

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Such being the wording and effect of the contract, we must hold that each cargo, on being delivered "over the rail of the vessel" sent for that purpose by the defendant or his captain, became at once the property of the defendant, unless the stipulation for piling and measuring on the defendant's dock, before payment, prevented the title from so vesting in him. Of course the 155 cords, being lost, was not so piled on the defendant's dock in Milwaukee, nor measured; and therefore it is claimed there is no obligation to pay. The contract contemplates no such loss. It contains no stipulation as to any one taking the risks of the perils of the lake. Without such stipulation, such risk would necessarily fall upon the owner of the cargo at the time of loss. It will be observed that the contract contains no stipulation for any inspection or sorting of the wood on the defendant's dock. The wood was to be taken from the vessel, piled and measured on the dock; but it is silent as to who should do the piling or the measuring. It seems to be conceded that the defendant was to do the piling. It may be inferable that the plaintiff's man was expected to witness or participate in the measurement of every cargo, as he did of each that was so piled on the dock. Was such piling and measuring a condition precedent to the vesting of the title thereof in the defendant? Where the manifest intention of the parties is to transfer the title, the sale may be complete, notwithstanding the property is yet to be measured, and the amount of the price yet to be ascertained. *Sewell v. Eaton*, 6 Wis. 490; *McConnell v. Hughes*, 29 Wis. 537; *Morrow v. Campbell*, 30 Wis. 90; *Fletcher v. Ingram*, 46 Wis. 191. So held where, by the agreement, the vendee was to have the title to saw-logs as soon as the vendor deposited them in a certain place. *Morrow v. Reed*, 30 Wis. 81. These principles are fully recognized and sanctioned in *Pike v. Vaughn*, 39 Wis. 505, relied upon by counsel for the defendant. Thus, in *Dixon v. Baldwen*, 5 East, 175, A. & B., traders in London,

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ordered goods from the defendants at Manchester to be sent to M. & Co., at Hull, for the purpose of being afterwards sent to the correspondents of A. & B., at Hamburg, and the defendants sent the goods to M. & Co. at Hull to be shipped by them to Hamburg, as usual, pursuant to the order; and it was held, as between the buyer and seller, the right of the defendants to stop as *in transitu* was at an end when the goods came to the possession of M. & Co. at Hull; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at Hull, were to receive a new direction from the vendees. To the same effect, *Kendal v. Stevens*, L. R. 11 Q. B. Div. 356; *Ex parte Miles*, L. R. 15 Q. B. Div. 39.

We must hold that the intention of the parties, as expressed in the contract, was that the title to each cargo should immediately vest in the defendant on being placed on board of the defendant's vessel at Gill's Pier. True, the contract provides, in effect, that each cargo was to be "paid for when piled on" the defendant's dock in Milwaukee, and that the cargo of 155 cords was never so piled on that dock. But the undisputed evidence shows that the failure to so pile on the defendant's dock was in no way attributable to the plaintiffs. It may be conceded, also, that it was not the fault of the defendant nor his agents, although the cargo was in the exclusive possession of the defendant at the time it was lost. Assuming that the loss of the cargo was not the fault of the defendant's agents, then such piling on the defendant's dock was rendered impossible solely by the act of God, and hence the defendant, upon its loss, thereupon became liable for its value. *Powers v. Dellinger*, 54 Wis. 389; *Nugent v. Smith*, L. R. 1 C. P. Div. 423; 2 Benj. Sales, § 861.

It appears from the undisputed evidence that the 155 cords of wood lost was of the kind and substantially of the

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quality called for in the contract, and the same as the other wood which had been received by the defendant without any objection, although a deduction was made in the price of twenty-six cords called culls. The title to the 155 cords of wood having become vested in the defendant when the same was placed on board of the Bailey, and the captain of the Bailey being in law the agent of the defendant for the purpose of receiving the wood, and having received the same on board the Bailey without any objection as to quality, and the wood having been lost, as indicated, it may be very doubtful whether any damages could be recovered in this action, even had there been a counterclaim for such damages in the answer. *Locke v. Williamson*, 40 Wis. 377. But here there was no such counterclaim, and hence the question need not be determined. The defendant does claim damages by way of counterclaim, however, for the failure to deliver the balance of the 1,000 cords called for by the contract, including the 155 lost. But the contract only required that the plaintiffs should deliver the wood at their pier to the defendant's vessel from time to time, "as wanted, during the season of navigation of 1884." There is no evidence of any failure to deliver any wood "as wanted" by the defendant during that season, nor of any unreasonable delay in furnishing wood to any vessel calling for it at the plaintiff's pier in behalf of the defendant. We discover no ground upon which the defendant is entitled to any damages under his counterclaim. *Simpson v. Crippin*, L. R. 8 Q. B. 14; *Higgins v. D., L. & W. R. Co.* 60 N. Y. 553; *Scott v. Kittanning Coal Co.* 89 Pa. St. 231; *Haines v. Tucker*, 50 N. H. 307.

By the Court.—The judgment of the county court is affirmed.

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MANN, Judge, etc., Respondent, vs. EVERTS and others, Appellants.

October 16 — November 3, 1885.

ESTATES OF DECEDENTS. *(1) Contingent claim when not barred: Action against heirs, etc. (2) Extent of liability of sureties on bond given on sale of land by administrator.*

1. A contingent claim against the estate of a decedent, which does not accrue and cannot be proven until after the administration is closed and the estate distributed, is not barred because not presented to the probate court for allowance. When such a claim becomes absolute the holder thereof may maintain an action against the heirs, devisees, etc., under ch. 141, R. S.
2. The sureties on a bond given by an administrator on obtaining license to sell real estate, are liable for the amount of the proceeds of the sale unaccounted for by the administrator and for the costs necessarily resulting from the proceedings to compel him to account therefor, but not for the amount paid for counsel fees in such proceedings.

APPEAL from the Circuit Court for *Milwaukee* County.

The action was brought in the name of the county judge of Milwaukee county against the heirs of one Charles P. Everts upon a bond given by Maurice Fitzgerald, as administrator *de bonis non* of the estate of John Fitzgerald, upon obtaining license to sell land. The said Charles P. Everts was one of the sureties upon the bond. The facts are sufficiently stated in the opinion. See, also, the case of *Estate of Fitzgerald*, 57 Wis. 508.

The circuit court rendered judgment in favor of the plaintiff for the sum of $1,363.18, with interest from September 15, 1883, being the amount of the proceeds of the sale of the land not accounted for by said Maurice Fitzgerald; also for the sum of $123.21, with interest from July 21, 1883, being the costs in the supreme court in the case of *Estate of Fitzgerald, supra*, and the sum of $50, with interest from September 15, 1883, being the costs in the circuit

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court in that case; also for the sum of $450, counsel fees expended by the heirs of John Fitzgerald in and about the prosecution of the administrator *de bonis non* to compel him to account, and in and about the accounting — making in all the sum of $2,152.89. The defendants appealed.

Joshua Stark, for the appellants, contended, *inter alia*, that the plaintiff was not entitled to judgment in this action for any of the costs adjudged to be paid by the administrator to the heirs in the matter of the estate of John Fitzgerald, nor for the expenses incurred by the heirs of John Fitzgerald for the services of counsel employed to prosecute the administrator. Such counsel fees are not taxable as costs, and could not be charged to the administrator as damages for failure to perform his duties as such. Nor can they be charged to his sureties, whose liability is limited to the strict letter of the bond. 2 Sutherland on Damages, 548; 1 id. 134; *Oelrichs v. Spain*, 15 Wall. 211; *Ohio v. Cutting*, 2 Ohio St. 1; *State v. Medary*, 17 Ohio, 565; *McGovney v. State*, 20 id. 97; *U. S. v. Boyd*, 15 Pet. 208; *Miller v. Stewart*, 9 Wheat. 702; Brandt on Suretyship, sec. 107; *Fairbanks v. Witter*, 18 Wis. 287; 1 Sedgw. on Damages (7th ed.), note, 173–180; Mayne on Damages (4th ed.), 90.

For the respondent there was a brief by *E. Mariner* and *Frank M. Hoyt*, and oral argument by *Mr. Hoyt*. To the point that the costs adjudged and the counsel fees paid in the proceeding to compel the administrator to account, were damages occasioned by the administrator's neglect, and hence recoverable in this action, they cited 1 Sutherland on Damages, 141; *Corcoran v. Judson*, 24 N. Y. 106; *Andrews v. Glenville Woolen Co.* 50 id. 282; *Rose v. Post*, 56 id. 603; *Gear v. Shaw*, 1 Pin. 608; *Meshke v. Van Doren*, 16 Wis. 319; *Bonesteel v. Bonesteel*, 30 id. 511.[1]

[1] See also *Cook v. Chapman* (New Jersey Chancery, Jan. 11, 1886), 2 Atl. Rep. 286, 33 Alb. L. J. 163.—Rep.

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COLE, C. J. In this case the learned circuit court decided that this action against the heirs of Charles P. Everts was not barred by the proceedings in the county court for the settlement and distribution of the estate of said Everts according to law. The correctness of this decision is the main question to be considered on this appeal. In addition to the facts stated when this case was here on a former appeal (see *Estate of Fitzgerald*, 57 Wis. 508), we may add that Charles P. Everts was one of the sureties on the bond given by Maurice Fitzgerald on obtaining a license to sell the real estate of his intestate. The bond was conditioned that the administrator would justly and truly account for all the proceeds of the sale of such real estate, and dispose of the same according to law, and perform all orders and decrees of the county court by him to be performed in the premises. In November, 1879, Maurice Fitzgerald was cited to render his account as administrator, and the items of that account was the matter considered on the other appeal. This court decided that there remained in the hands of the administrator, unaccounted for, a larger sum than was found by the circuit court. It therefore reversed the judgment of that court, and remitted the cause for the entry of a judgment for the proper amount. In conformity to this direction the county court in probate, to which the cause had been remitted by the circuit court, in September, 1883, rendered judgment against the administrator for $1,363.18, the amount of the proceeds of the sale still in his hands, with interest thereon from September 15, 1883. The administrator was ordered to pay this amount over to the heirs of John Fitzgerald, or to the persons named, which he neglected to do. This action was then brought under the statute against the heirs of Everts to enforce the liability arising on this bond above named. It appears that Everts died in 1871, while an inhabitant of Milwaukee county. An administrator was appointed to settle his estate. The

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county court made an order in April, 1873, allowing creditors four months to present their claims against said estate. No claim, contingent or otherwise, was ever presented for allowance on account of any liability upon the bond. In December, 1873, a final decree was entered by the county court settling the matter of the Everts estate, and distributing the property, both real and personal, to the persons entitled by law to the same.

These are all the facts necessary to be stated in order to understand the position of counsel in the case. On the part of the heirs of the Everts estate it is insisted that all claim or liability against that estate arising upon this bond is barred, because no attempt was ever made to present or to prove it against the estate within the time limited for the presentation of claims, nor within one year after the claim accrued or became absolute. The provisions of ch. 101, 2 Tay. Stats., as amended by ch. 73, Laws of 1873, it is insisted, sustain this position. The sections more especially relied upon are 14, 47, 48, 49, 51, 52, and 55. From these and other provisions of the statutes the learned counsel contends that the county courts are the sole tribunals for the adjustment of all claims against the estates of deceased persons, whether such claims are absolute or contingent; and that where administration has been had upon an estate, and notice and opportunity given for creditors to present their claims for allowance, they must do so within the time limited, or their claims will be barred. This is undoubtedly correct as to all claims proper to be allowed by the commissioners. Sec. 14 expressly declares that unless the creditor shall exhibit his claim within the time limited for that purpose, it shall be forever barred. Sec. 3844, R. S. 1878. The other sections referred to by counsel relate to the allowance of a certain class of contingent claims. Where a person is liable as security for the deceased, or has any other contingent claim against his estate which cannot be proven as a

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debt before the commissioners or allowed by them, the same may be presented, with the proper proof, to the judge of the county court or to the commissioners, who shall state the same in their report when it is presented to them. If the court shall be satisfied by the proof exhibited of the justness of the claim, it may order the executor or administrator to retain in his hands sufficient estate to pay such contingent claim when it becomes absolute. Secs. 47, 48; sec. 3858, R. S. 1878. Sec. 49 provides if a contingent claim becomes absolute, and shall be presented to the judge of the county court or to the executor or administrator at any time within two years from the time limited for other creditors to present their claims to commissioners, it may be allowed by the judge, upon due proof, or may be proven before the commissioners already appointed, or before others to be appointed for the purpose, in the same manner as if presented for allowance before the commissioners had made their report. Sec. 3859, R. S. 1878. Sec. 51 provides if the claim shall accrue or become absolute at any time after the period limited for creditors to present their claims, the person having such claim may present it to the county court and prove the same at any time within one year after it shall accrue or become absolute; and, when established in the manner prescribed, the executor or administrator is required to pay the same, if he have sufficient assets for that purpose, or is required to pay such part as he shall have assets to pay. Sec. 3860, R. S. 1878. By the next section, when a claim shall be presented within one year from the time it shall accrue, and be established, and the executor or administrator shall not have sufficient to pay the whole of the claim, the creditor has the right to recover such part of the claim as the executor or administrator has not assets to pay, against the heirs, devisees, or legatees who have received sufficient real or personal property from the estate to pay the same. Sec. 3861, R. S. 1878.

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It seems to us obvious, from the language of these provisions, that the contingent claim referred to is one which accrues and becomes absolute before the administration upon the estate is closed, and before a decree of distribution of the estate has been made by the county court. We do not think they were intended to or do apply to a contingent claim like the present, which did not accrue and which was incapable of being established by proof until years after the estate of Everts had been fully administered. The breach of the bond did not occur until nearly ten years after that time. The very existence of any future liability of that estate was uncertain, depending upon the contingency of Maurice Fitzgerald's performing the condition of his bond. If he should faithfully perform that condition the Everts estate would have to answer for no breach. But if the administrator failed to perform, what damages would result from the breach, and how could they be ascertained? Suppose the breach were one which would furnish a claim for nominal damages only, or for a portion of the penal sum. Is it not apparent that in 1873 it was utterly impossible for the Fitzgerald heirs to prove any contingent liability or claim against the Everts estate? According to our view the statute refers to a contingent claim or liability which can be established by proof, and the amount ascertained. Where a contingent liability exists, and the contingency happens so that the contingent liability becomes an absolute debt which may be proven by the creditor before the settlement of the estate has been closed and the property distributed, there the statute bars the claim if not presented to the commissioners or the county court within the time allowed. All that can be said in this case is that in 1873 there was an outstanding unbroken bond, on which the Everts estate stood as surety, conditioned for the performance of duties created by law by an administrator who, so far as appears, was then able to perform all his duties. Of course, it was

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then impossible to fix any liability upon the estate unless the whole amount of the penal sum should be assumed as the debt or claim which the estate would have to pay. This bond was an obligation of a peculiar character, given by the administrator to the county judge as security for the faithful performance of a trust or legal duty. Such an obligation cannot be considered as a debt either *in præsenti* or *in futuro*. It may, in case of a breach, be the foundation of a debt or liability, but a claim arising from it in the nature of a debt will arise from the breach and not from the mere existence of the obligation. *Loring v. Kendall*, 1 Gray, 305; *French v. Morse*, 2 Gray, 111; *Woodard v. Herbert*, 24 Me. 358; *Ellis v. Ham*, 28 Me. 385; *Dole v. Warren*, 32 Me. 94.

It is true, these cases arose under the bankrupt law, but they illustrate the principle as to what is deemed a contingent claim or liability provable against the bankrupt. In this case the actual breach of the condition of the bond did not occur until nearly ten years after the settlement of the Everts estate, and long after the jurisdiction of the county court over that estate had been exhausted. The statute provides no way for the county court reinvesting itself with that jurisdiction for the purpose of adjusting the claim against it. So, under the circumstances, there was no remedy in that court. The creditor was put to his action under ch. 141, R. S. 1878, which substantially includes secs. 55, 58, 60, ch. 101, Tay. Stats. See Reviser's Notes, p. 236. The statutes of Minnesota in regard to the settlement of estates, and allowance of contingent claims against them, are essentially the same as our own. In *McKeen v. Waldron*, 25 Minn. 466, is a well-considered opinion delivered by GILFILLAN, C. J., in which it is in effect held that "a contingent claim against the estate of a deceased person, which does not become absolute within the time limited for creditors to prove their claims before com-

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missioners, is not barred by not being presented to the commissioners or to the probate court; but the holder of such claim may, after it becomes absolute, maintain an action against the heirs, devisees, next of kin, or legatees to whom the estate has been distributed, to recover such claim to the extent of the estate so distributed." The decision, we think, is sound, and strictly in point in this case.

It is unnecessary to say that the case of *Ernst v. Nau*, 63 Wis. 134, is not in conflict with these views. There the condition of the bond was broken, and the amount of the liability ascertained, before the surety, Nau, died. The liability was a fixed and absolute one, and the claim against his estate for contribution might have been presented and proven within the time limited for the presentation of claims against it. Not having been presented, it was held that the statute barred it. But the administration upon that estate was not closed.and the property distributed before the liability was fixed, as in the case before us.

It follows from these views that the plaintiff's right of recovery is not barred by the proceedings taken in the Everts estate.

The next question is as to the extent of this liability. Of course the plaintiff is entitled to recover the amount of the proceeds of the sale, viz., $1,363.18, unaccounted for by the administrator, with interest from September 15, 1883. We think he is entitled to recover the costs awarded in this court and in the circuit court, necessarily resulting from the action to enforce the claim of the heirs against the administrator. These costs are fairly chargeable to the surety upon his undertaking by reason of the default of the principal in the bond. Beyond this, the estate of the surety or the defendants are not liable. The circuit court held that the plaintiff was entitled to recover the sum of $450 counsel fees, expended by the Fitzgerald heirs in compelling the administrator to account, and in and about the accounting.

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We do not think such counsel fees are covered by the obligation of the surety on this bond; therefore they should not be recovered. This is not a bond of indemnity to pay all damages which may result from the default of the administrator.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded to enter a judgment in accordance with this opinion.

MUNKWITZ, Appellant, vs. UHLIG, Respondent.

October 17—November 3, 1885.

(1) Landlord and tenant: Covenant not to assign or underlet: What constitutes a breach. (2) Court and jury: Special verdict: Judgment.

1. The stock of goods belonging to the lessee of a store building was sold on execution and was purchased by Y., his father-in-law, who transferred it to his son, Y. Jr., in pursuance of an arrangement with the lessee that the business should be carried on in the name of Y. Jr., the lessee receiving a certain sum each month out of the profits for his maintenance, and the balance of the proceeds being applied in payment of his debts. Neither Y. nor Y. Jr. received any of the profits or proceeds of the business for their own use. The goods were not removed from the store and the business was conducted as before the sale, by the lessee, except that moneys received were deposited in the name of Y. Jr. and he signed all checks. *Held*, that these facts do not show a breach of a covenant in the lease not to assign or otherwise part with the lease and not to underlet or part with any portion of the leased premises.
2. Where the evidence conclusively shows that the plaintiff is not entitled to recover, and a special verdict contains no finding which interferes with the rendition of judgment for the defendant, judgment may be rendered accordingly although the verdict does not find the facts essential to support such judgment.

APPEAL from the County Court of *Milwaukee* County.

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This action was brought under the statute (R. S. sec. 3358), before a justice of the peace, to obtain restitution of a certain store building in the city of Milwaukee which the plaintiff had theretofore leased to the defendant. It is alleged that the defendant holds possession thereof contrary to a covenant of the lease against underletting. Subd. 3. Service of statutory notice requiring delivery of the possession of the leased premises is also alleged and admitted. The trial before the justice resulted in a judgment for the plaintiff, whereupon the defendant appealed to the county court.

The pleadings and uncontradicted evidence introduced on the trial in the county court establish the following facts: The lease was executed May 1, 1883, for a term of three years commencing on that day, at a stipulated yearly rent of $1,000, payable monthly. The defendant and one Wilde, his partner, were the original lessees, but Wilde afterwards retired from the business carried on in the leased store, and the plaintiff consented thereto and accepted the defendant as sole lessee.

The lease contains a covenant on the part of the lessee "not to assign or underlet the said premises, or any part thereof, or otherwise part with this indenture, or the premises hereby leased, or any part thereof, to any person or persons whatever, without the consent thereto in writing of said lessor, his representatives or assigns, first had and obtained in writing thereto." The lease also contains a stipulation of forfeiture if default be made by the lessees in any of the covenants or agreements therein contained, and giving the lessor, in case of such default, the right to re-enter the leased premises and expel the lessees therefrom.

The action is founded entirely upon an alleged breach of the covenant above quoted. It is stated in the complaint that after the defendant became sole tenant, he "remained in such sole posssesion until on or about the 7th day of

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November, 1884, when, without any consent or permission of the said *Munkwitz*, he, the said *Uhlig*, contrary to the covenants and conditions of said lease, parted with such sole possession and control of said premises by admitting into joint possession thereof with himself, and contrary to said terms, one William Young, Jr., who now holds possession and control thereof with said *Uhlig*, without any consent or permission of the said *Munkwitz*, and contrary to the said terms of said lease." The facts upon which the alleged breach of the covenant is predicated are stated in the opinion.

The jury entered the following special verdict: "(1) Had the defendant suffered Wm. Young, Jr., to be in possession, with the stock of goods purchased by said Young, of the premises described in the lease, for the purpose of business? Yes. (2) Was he, said Young, so in possession at the time of the notice to quit? Yes. (3) Was possession with the consent of said plaintiff? No. (4) Was William Young, Jr., in possession as an assistant of *Arthur Uhlig*, the defendant? No. (5) Was *Arthur Uhlig*, the defendant, conducting the business at the store in the complaint mentioned, as Young's agent? No. (6) Was *Arthur Uhlig*, the defendant, conducting the business on the premises mentioned, as the agent of William Young, Jr., but ultimately for his own benefit? No."

The plaintiff moved for judgment on the special verdict, which motion was denied. The defendant moved that such verdict be set aside, and for a new trial or for judgment. The court, thereupon, set aside the verdict and gave judgment for the defendant, dismissing the complaint, with costs. The plaintiff appeals from such judgment.

For the appellant there was a brief by *Nath. Pereles & Sons* and *E. P. Smith*, and oral argument by *Mr. Smith*. They contended, *inter alia*, that any entire or partial surrender of control of the premises by the tenant during the

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term, without the landlord's consent, was a breach of the covenant. The words used cannot be restricted to an underletting or assignment. *Doe dem. Michinson v. Carter*, 8 Term, 57; *Roe dem. Dingley v. Sales*, 1 Maule & S. 297; Platt on Covenants, 409, 410; *Greenslade v. Tapscott*, 1 Cromp., M. & R. 55; *Rex v. St. Nicholas*, 5 Barn. & Ad. 229; 27 Eng. C. L. 71. If Young entered with the lessee's consent the result must have been a tenancy of some kind. *Cross v. Upson*, 17 Wis. 619; *Gunsolus v. Lormer*, 54 id. 633; *Larned v. Hudson*, 60 N. Y. 102; 4 Kent's Comm. 114. A permission for Young to jointly occupy would make him a tenant at will. *Ezelle v. Parker*, 41 Miss. 520; *Leavitt v. Leavitt*, 47 N. H. 329. And in the following cases a mere permissive holding, or a holding under an agreement for a lease, or a void lease, or a contract for a sale which has gone off, is sufficient to sustain the action for use and occupation, which is said only to lie where the relation of landlord and tenant exists. *Codman v. Jenkins*, 14 Mass. 93; *Blume v. M'Clurken*, 10 Watts. 380; *Warner v. Hale*, 65 Ill. 395; *Howard v. Shaw*, 8 Mees. & W. 118; *Little v. Pearson*, 7 Pick. 301; *La Farge v. Park*, 1 Edm. S. C. (N. Y.) 223; *Nance v. Alexander*, 49 Ind. 516.

For the respondent there was a brief by *Van Dyke & Van Dyke*, and oral argument by *Mr. Geo. D. Van Dyke*. They argued, among other things, that, assuming that the covenant for re-entry would make the lease voidable upon nonperformance of any covenant to which it relates, it cannot be coupled with the covenant not to assign, etc., for *ex vi termini* it relates merely to *affirmative* covenants, or covenants to be "performed," and not to *negative* covenants which cannot be "performed." Platt on Covenants, 19. The word "default" means "a failure in performance." Webster's, Worcester's and Bouvier's Dict. *sub nom.* See *Doe dem. Polk v. Marchetti*, 1 Barn. & Ad. 715; Taylor on L. & T. sec. 489; Wood on L. & T. 863; *Doe dem. Abdy v.*

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Stevens, 3 Barn. & Ad. 299; *Wadham v. Postmaster Gen.* L. R. 6 Q. B. 644; *West v. Dobb*, 5 id. 459; *Evans v. Davis*, L. R. 10 Ch. Div. 747, 761; *Hyde v. Warden*, L. R. 3 Exch. 82; 1 Washburn on R. P. 478. A strict rule of construction applies to provisos for re-entry, involving forfeitures of terms, and also to covenants in restraint of alienation. *Crusoe v. Bugby*, 3 Wils. 234; Taylor on L. & T. sec. 403; Wood on L. & T. sec. 324; Platt on Covenants, 406; *Riggs v. Pursell*, 66 N. Y. 201; *Mills v. Evansville Seminary*, 58 Wis. 138–140; *Morse v. B. F. & M. Ins. Co.* 30 id. 540; *Lawe v. Hyde*, 39 id. 346. The facts shown in this case do not constitute a breach of the covenant. The covenant forbids assigning and underletting merely, and does not prevent the tenant, neither assigning nor underletting, from parting with the possession of the demised premises, or sharing the possession with another. *Church v. Brown*, 15 Ves. Jr. 265; Platt on Covenants, 403–410; Taylor on L. & T. secs. 402–409; Wood on L. & T. sec. 324; 1 Washburn on R. P. 472; *Crusoe v. Bugby*, 2 W. Blackst. 766; *Doe dem. Pitt v. Hogg*, 4 Dowl. & Ry. 226; *Doe dem. Pitt v. Laming*, 4 Campb. 73; *Jackson v. Harrison*, 17 Johns. 66; *Roosevelt v. Hopkins*, 33 N. Y. 81; *Bristol Corp. v. Wescott*, L. R. 12 Ch. Div. 461; *Hargrave v. King*, 5 Ired. Eq. 430; *Harrison v. Belsey*, T. Raym. 413, 414; *Schroeder v. King*, 38 Conn. 78; Comyn's Dig. tit. CONDITION (Q); *Anon.* Moore, pl. 49; *Clark v. Clark*, 49 Cal. 586; *Leduke v. Barnett*, 47 Mich. 158; *Pence v. St. P., M. & M. R. Co.* 28 Minn. 488. William Young, Jr., was at most a licensee. Wood on L. & T. sec. 227 and note 6; Taylor on L. & T. sec. 24; Woodfall on L. & T. (11th ed.), 113, 114; 1 Washburn on R. P. 629, 634–5; *Chynoweth v. Tenney*, 10 Wis. 408; *Duinneen v. Rich*, 22 id. 550; *Tyson v. Guineas*, 25 id. 660; *Lockhart v. Gier*, 54 id. 113. Even if the covenant could be construed to prohibit parting with the possession of the premises or any part thereof, such covenant would be broken only by

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parting with the possession of the whole or some specific part. Sharing the possession with another would not be a breach.

LYON, J. The material evidence in the case is entirely uncontradicted. It proves that shortly before November 7, 1884, the sheriff levied an execution upon the defendant's stock of goods, and by virtue thereof duly sold the same to one Steck. Immediately thereafter, William Young, Sr., the father-in-law of the defendant, bought the goods of Steck, and sold the same to his son, William Young, Jr. The intervention of the Youngs was for the sole benefit of the defendant, pursuant to some arrangement or understanding between them and the defendant that the business should be continued and carried on in the name of Young, Jr., the defendant to receive a stated sum per month out of the profits for his maintenance, and the balance of the proceeds of the business to be applied in payment of the defendant's debts. The Youngs were to have none of the profits or proceeds of the business to their own use, and never so received any part thereof. All this was upon the condition that the defendant should conduct himself properly, and there is no claim that he did not do so. The goods were not removed from the store by the sheriff or either of the purchasers, and the business was carried on therein as before the seizure, by permission of the defendant. The defendant remained in the store and conducted the business as before, with the exception that the money received in the business was deposited in the name of Young, Jr. It does not satisfactorily appear that the latter had anything to do with the business except to go to the store for a short time daily and sign checks. Such was the situation of affairs when the statutory notice was served, November 26, 1884. The case is barren of evidence tending to show that the defendant ever formally assigned, trans-

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ferred, or disposed of his interest in the lease, or any part thereof, or underlet the leased premises, or any part thereof. Indeed, it is conclusively proved that he did not do so.

The foregoing are all the material facts in the case bearing upon the question whether there was a breach of any covenant in the lease. Unless it necessarily results from those facts that the defendant has made default in some one of his covenants or agreements contained in the lease, there is no proof of any such default. His covenant is that without the consent of his landlord he will not assign or otherwise part with the lease, and will not underlet or part with any portion of the leased premises. Certainly he has not assigned or parted with his lease, neither has he formally underlet the leased premises. There is no testimony tending to prove that the defendant has done either of these acts. On the contrary (as before stated), it is affirmatively proved that he has not. Hence, if there has been any breach of covenant, it is because the defendant has parted with the leased premises, or some portion thereof. Has he done so? We fail to find any testimony tending to show that he has. He was there managing and controlling the business as he had done before his stock was seized and sold, except that his relatives, with his consent, had placed restrictions upon him respecting the expenditure of money, the proceeds and profits of the business. True, the legal title to the goods was in Young, Jr., but he held the title thereto as a sort of trust created by Young, Sr., for the sole benefit of the defendant. There is no hint in the testimony of any interference by either of the Youngs with his management of the business. He transacted this business in the leased store, and at the same time held the lease thereof unassigned and unimpaired. It seems clear that an action for a trespass to the leased premises would necessarily have been brought in the name of the defendant, and that he could at any time have lawfully required Young, Jr., to re-

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move the goods from the store. The rule that courts will construe a contract or other instrument strictly to prevent a forfeiture need not be invoked to save this lease. On the undisputed evidence it must be held that the covenant under consideration has not been broken.

It was maintained on behalf of the defendant that the covenant not to assign the lease, or part with the possession of the leased premises, being a mere negative covenant, is not within the stipulation giving the lessor the right of re-entry in case of default in respect to any of the covenants or agreements contained in the lease. This proposition was argued with much ability by the respective counsel. Having reached the conclusion that there has been no breach of that covenant, it is unnecessary to determine the proposition.

The special verdict will now be briefly considered. The jury found that the defendant, without the consent of the plaintiff, suffered William Young, Jr., to be in possession, with the stock of goods, of the leased premises for the purpose of business. This is not an explicit finding that the defendant parted with the possession of any portion of the leased premises. It must be construed and understood with reference to the undisputed facts in the case. So construed, the finding means only that Young, Jr., had just such possession of the premises as resulted from his interest in the goods and business, and none other. We have already seen that such interest did not operate to divest the defendant of his lease, or his possession under it of the whole or any part of the leased premises. Hence this is not a sufficient finding that the defendant has broken any covenant or agreement contained in the lease.

The remaining findings are to the effect that Young, Jr., was not in possession as an assistant of the defendant, and that the latter was not conducting the business as agent of Young, Jr., but for his own benefit. It is conclusively

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proved that the defendant was conducting the business for his own benefit. Otherwise these findings are unobjectionable. Young, Jr., was not the agent of the defendant, and the latter was not the agent of Young, Jr. The relation between them was more like that of *cestui que trust* in actual possession of the trust property, and trustee. Such relation was not hostile to any covenant in the lease.

It results from this brief analysis of the special verdict that the facts found therein are insufficient to support a judgment for the plaintiff, unless the first finding be construed to mean that the defendant actually parted with the possession of the leased premises. We have seen that if so construed it is unsupported by any evidence. The plaintiff, therefore, was not entitled to judgment on the special verdict, and it was not error to set the verdict aside, although, had it been allowed to stand, probably it would not have been an obstacle to a judgment for the defendant.

Had the jury found the same facts they did find, and in addition thereto had they found that the defendant did not assign or part with his lease, and did not underlet or otherwise part with any portion of the leased premises, the court would construe the first finding to mean only that Young, Jr., had such possession of the leased premises as resulted from his interest in the goods and business, and none other. So construed, the finding would not conflict with such supposed additional finding, and judgment would go for the defendant upon the verdict, without setting aside any of the findings therein.

In *Hutchinson v. C. & N. W. R. Co.* 41 Wis. 541, the rule was established, and has since been adhered to, that if the jury fail in a special verdict to find a fact essential to uphold the judgment recovered, if the undisputed evidence proves such fact, the judgment will not be disturbed because of such omission. It is there said: "In such a case a finding upon the issue is matter of form rather than substance; for

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certainly there can be no substantial difference between directing the jury to find that the title was in the plaintiff, and then giving judgment for him founded on such finding, and rendering the same judgment without such finding." *Weisel v. Spence*, 59 Wis. 301, and cases there cited.

The evidence showing conclusively that the plaintiff was not entitled to recover, and the special verdict containing no finding of fact which interfered with the rendition of judgment for the defendant, we think the court properly gave judgment in his favor. See *Gammon v. Abrams*, 53 Wis. 323.

Other questions were argued, but those above determined are conclusive of the case.

By the Court.— Judgment affirmed.

PAPWORTH, Respondent, vs. THE CITY OF MILWAUKEE, Appellant.

October 17 — November 3, 1885

MUNICIPAL CORPORATIONS: *Areas under sidewalks: Improperly protected openings: Primary liability for injury: Parties: Milwaukee city charter.*

1. A lot-owner, being the owner of the fee to the middle of the street, may construct vaults or other areas under the sidewalk with openings in the walk, if this is done in such a manner as not to interfere with or endanger public travel.
2. But such owner is liable in damages to any person traveling the sidewalk who may be injured by reason of his neglect to keep such openings properly and securely covered or otherwise protected.
3. Sec. 1, ch. 20 of the charter of Milwaukee (Laws of 1874, ch. 184) — providing that when any injury shall happen by reason of any defect in any sidewalk or other cause for which the city would be liable, and such defect or other cause of injury shall arise from the default or negligence of any person, such person shall be primarily liable for such injury, and the city shall not be liable therefor until

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after all legal remedies against such person have been exhausted,—applies only when the default or negligence of the person was the *sole cause* of the injury.

4. Under the charter, therefore, when the actual neglect of the city (in this case the failure to keep the sidewalk itself in repair) concurs in causing the injury with the neglect of the owner to keep the opening properly protected, the action may be brought in the first instance against one or both of the wrong-doers, and in an action against either the wrongful act or negligence of the other is no defense.

APPEAL from the County Court of *Milwaukee* County.

Action to recover damages for an injury to the person of the plaintiff caused by her falling through a hole in a sidewalk in the defendant city. The material portion of the answer and the view taken by this court of the evidence, will appear from the opinion.

The county court instructed the jury as follows:

"1. That the opening for vault purposes, made by Mrs. Kneeland, the owner. of the premises, in the sidewalk thereon, at the time of its construction eleven years ago, in order to put in wood, coal and other articles of use for the occupant into the vault below, having been properly covered with a trap door, let into the walk at the time of its construction, and so as not then to impede public travel thereover, was not at that time in itself a nuisance; but as Mrs. Kneeland was the owner in fee to the center of the street, subject to the public easement or right of use for all legitimate purposes of travel, she had the right, for the beneficial uses and purposes I have mentioned, to make said opening if it was done and secured in a proper manner and so as not to interfere with or endanger public travel.

"2. If such opening was so made and secured and brought down to an equal surface with the walk, and if the walk itself was then safe and secure and the door over the opening was so fastened and was as firm as the walk, then the city, in the absence of any corporate action opposing the

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building of the same, or any opposition thereto, and permitting the public to use it, must be regarded as adopting this trap-door as part of the walk, and was under obligation to keep it, as well as the rest of the walk, in safe and suitable repair and security for public travel, and it would be liable for any damage resulting to a person lawfully walking over the same from such want of repairs; provided, the defendant city had prior notice of such condition of things in time to have made the same secure, and such notice may be actual or implied when such condition of things has existed long enough so that the city by its proper officers, in the exercise of ordinary care, ought to have known and discovered such want of repair in time to have made the repairs prior to the accident; provided always, that within sixty days thereafter plaintiff gave due notice of her injury to the defendant, stating the place where such damage occurred and describing generally the insufficiency and want of repair that occasioned the same, and stating in said notice that satisfaction was claimed therefor of the city, and claiming compensation for her damages, which notice and claim is admitted by defendant to have been duly given.

"3. The greatest question in the case is whether or not this action should have first been brought against the lot-owner in front of whose premises this was constructed, and her remedies exhausted as against the lot-owner, before an action would lie against the city; that question has been argued fully by counsel on both sides to the court and, as you have learned before this, the court has come to the conclusion that this is not such a case as is contemplated by the charter that should first be brought against the lot-owner, before the action could be maintained against the city, and for the purposes of this trial you are to take that to be the law of this case.

"4. Although the costs and expenses of repairing and maintaining a sidewalk on a public street in the city of *Mil-*

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waukee may be made chargeable to the lot of land abutting upon the same, yet the owner of such land is not personally liable for such neglect or refusal to repair such sidewalk or street which has become defective or out of repair by reason of ordinary wear or use by the public, or by the action of the elements, and no action at law can be maintained against such owner for damages for injuries sustained by another, resulting or caused by a defective sidewalk, when such defect is occasioned by public use or the action of the elements.

"5. The owner of a lot of land abutting upon a public street is not the custodian of the same and owes no duty to the public to keep the sidewalk or street in repair.

"6. The city of *Milwaukee* is made, by law, chargeable with the duty to keep the streets and sidewalks in repair within the corporate limits, and is solely liable for neglect of such duty to the person injured, whose injuries have been caused by defect or want of repair of such street or sidewalk, which is occasioned by the wear of public use or the action of the elements, and not by the unlawful act of the owner of the adjoining land."

The court refused to give the following instructions requested by the defendant:

"1. If you find from the evidence that the sidewalk, at the place of the accident to the plaintiff, was built by the owner of the adjacent lot and dwelling, over a hollow space several feet deep which was intended and used exclusively by said lot-owner and her tenants for their private convenience as a place for storing wood and coal, then it was the duty of such lot-owner and her tenants, keeping and using the premises, to keep said sidewalk over such hollow space in good repair, and they are primarily liable for injuries suffered by reason of their neglect to keep such walk in good repair.

"2. If you find that the owner of the lot and dwelling

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fronting on the sidewalk at the place where the plaintiff was injured, cut a hole or opening in the surface of said walk, at the time said walk was constructed, for the exclusive use, benefit, and convenience of her tenants occupying said premises, through which wood and coal might be thrown into the hollow space under such sidewalk, and covered said hole or opening with a wooden trap-door which could be lifted up at pleasure, then such owner and tenants occupying said premises and using said opening were in duty bound to keep said opening and the trap-door covering the same in good condition as to repair, and they are primarily liable for any injury resulting from their neglect so to do.

"3. If you find from the evidence that the injuries sustained by the plaintiff were due to the existence of a hollow space under said sidewalk, several feet deep, kept and used for the sole convenience and benefit of the owner of the adjacent lot and dwelling and her tenants, then the city is not liable for such injuries until the plaintiff has tried, without success, to collect her damages therefor from the owner or occupant of such lot.

"4. If you find from the evidence that the plaintiff was injured by falling through a coal hole, made in the sidewalk by the owner of the adjacent lot, for the exclusive convenience and use of herself and her tenants, and covered with a trap-door, which had become unsafe and insecure, by reason of the decay of the supports under said door and of neglect to keep the said trap-door and its supports in suitable repair, then the owner or occupant of said lot is primarily liable for such injuries, and no action can be maintained therefor against the city until after the plaintiff shall have exhausted her remedies against such lot-owner or occupant."

There was a verdict for the plaintiff, assessing her damages at $875; a motion for a new trial was denied; and

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from the judgment entered on the verdict the defendant appealed.

For the appellant there was a brief by *Robert Luscombe*, City Attorney, and *Joshua Stark*, of counsel, and oral argument by *Mr. Stark*. To the point that when a lot-owner makes an opening in the sidewalk to give access to the open area beneath, used in connection with the buildings on the lot, he or his tenants in possession, or both, are bound so to construct and guard such opening and the cover of the same, and so to maintain and keep them in repair, that the sidewalk shall be as safe for public passage as if such opening and area did not exist, they cited 2 Dillon on Mun. Corp. secs. 699, 700, 1032 *et seq.; Perley v. Chandler*, 6 Mass. 454; *S. C.* 4 Am. Dec. 159; *Lowell v. Spaulding*, 4 Cush. 275; *Dygert v. Schenck*, 23 Wend. 445; *S. C.* 35 Am. Dec. 575; *Durant v. Palmer*, 29 N. J. Law, 544; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, id. 84; *Irvine v. Wood*, 4 Robertson, 138; *S. C.* 51 N. Y. 224; *Irvine v. Fowler*, 5 Robertson, 482; *Davenport v. Ruckman*, 10 Bosw. 20; *S. C.* 37 N. Y. 574; *Clifford v. Dam*, 81 id. 52; *Stephani v. Brown*, 40 Ill. 428; *Severin v. Eddy*, 52 id. 189; *Gridley v. Bloomington*, 68 id. 47; *Fisher v. Thirkell*, 21 Mich. 1; *S. C.* 4 Am. Rep. 422; *Calder v. Smalley*, 23 N. W. Rep. 638. If the plaintiff has a right of action against the persons making and maintaining the opening, then sec. 1, subch. 20, ch. 184, Laws of 1874, is applicable, and she must exhaust her remedy against such persons before she can maintain an action against the city.

For the respondent there was a brief by *Nath. Pereles & Sons* and *E. P. Smith*, and oral argument by *Mr. Smith*. They argued, among other things, that the owner of a lot in the city of Milwaukee has the fee thereof to the center of the street (*Goodall v. Milwaukee*, 5 Wis. 32; *Milwaukee v. M. & B. R. Co.* 7 id. 85), and has the right to make any use of the land, subject to the public easement. Washburn on

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Easements, 196; *Hundhausen v. Bond*, 36 Wis. 29. An excavation under the sidewalk and an opening in the walk, properly and safely constructed for the convenience of the owner, is not to be treated as a nuisance. *Clark v. Fry*, 8 Ohio St. 358; *Fisher v. Thirkell*, 21 Mich. 1; *Johnston v. Charleston*, 3 Rich. (N. S.), 232–9; *Lafayette v. Blood*, 40 Ind. 62; *Crosby v. Boston*, 118 Mass. 71, 73; *Fitzgerald v. Berlin*, 51 Wis. 81; *Waupun v. Moore*, 34 id. 452. The fact that the city charter and the ordinances provide for the regulation by the city of such structures and openings, is evidence that they are not nuisances *per se*, but are necessary and useful parts of the city's streets and sidewalks and, equally with the other parts thereof, within the city's care and control. The fact that the city had permitted the owner or occupant of the premises to make use of this trapdoor for so many years, is evidence of an implied license, if license was originally necessary, and the city cannot now question it. *Barling v. West*, 29 Wis. 308; *Smith v. Leavenworth*, 15 Kan. 81; *James v. Portage*, 48 Wis. 682; *Luck v. Ripon*, 52 id. 196; *Augusta v. Hofers*, 59 Ga. 151; 2 Dillon on Mun. Corp. sec. 1060; *Oliver v. Kansas City*, 69 Mo. 83. And the city must be deemed to have adopted the sidewalk, with the opening and its cover, as a part of the walks under its control. *Johnson v. Milwaukee*, 46 Wis. 568; *Seward v. Milford*, 21 id. 489; *Kelly v. Fond du Lac*, 31 id. 179; *Neeves v. Supervisors*, 46 id. 36; *Houfe v. Fulton*, 34 id. 608; *Everett v. Marquette*, 53 Mich. 450. As to the constitutionality of a law making the lot-owners liable to others than the city for injuries resulting from a defective walk of which it has the care and direction, see *Noonan v. Stillwater*, 33 Minn. 198; *Keokuk v. Keokuk*, 53 Iowa, 352; *Taylor v. L. S. & M. S. R. Co.* 45 Mich. 74.

TAYLOR, J. This action was brought by the respondent against the city of *Milwaukee* to recover damages for an

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injury sustained by her by falling through a sidewalk in one of the streets of said city.

It is admitted on the argument of the appeal in this court that if the city has any defense to the action of the respondent, it is under that part of its answer which reads as follows: "This defendant further alleges that the said sidewalk at the place aforesaid, in front of the premises known as No. 131 Third street, in said city of *Milwaukee*, was constructed and maintained by the owners or occupants of said premises, and that for their own use and convenience, without any order, directions, or permission of the defendant or the proper authorities of said city, they, the said owners or occupants, made in said sidewalk an opening near the curb line thereof, through which coal and wood might be thrown into the cavity or space beneath said walk, for the use of the occupants of said premises, and covered such opening with a trap, which was designed by them to make the said sidewalk complete and its surface even over the whole width thereof; and this defendant alleges that if any injury or accident occurred to the plaintiff at the time and place stated in her complaint by reason of any defect of the said sidewalk, the same occurred at the said opening therein made by the said owners or occupants of said premises, and was due solely to the said opening for a coal-hole in said sidewalk so made and maintained by said owners or occupants of said premises as aforesaid, and to the giving way and falling of the said trap covering said hole, and the cause of such injury or accident arose from and was produced by the wrong, default, and negligence of such owners or occupants in respect to such coal-hole and the trap covering the same, and not otherwise, and by law said owners or occupants were and are primarily liable for such injury; and this defendant alleges, upon information and belief, that no action or legal remedy has hitherto been commenced or attempted by the plaintiff to collect her damages for

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such supposed injury from said owners or occupants, or any or either of them."

The claim of the counsel for the appellant is that the injury to the plaintiff was caused by the giving way of the trap covering a hole in the sidewalk, made therein by the owners of the adjoining lot for the sole uses and purposes of such owners and occupants; that the trap or covering of said hole gave way under the plaintiff as she was passing along said sidewalk and caused the injury complained of, and that such injury was not by reason of any defect or insufficiency of the sidewalk in any other respect; that because the injury to the plaintiff was so caused, the owners or occupants of said adjoining lot were primarily liable to the plaintiff for the injury done, and no action can be maintained against the city to recover damages for such injury until an action has first been commenced against such owners or occupants for her damages and an attempt made to collect such damages of them.

This defense is based upon a provision in the charter of the city of *Milwaukee* which reads as follows: "Whenever any injury shall happen to persons or property in said city of *Milwaukee* by reason of any defect or incumbrance of any street or sidewalk, alley or public ground, or from any other cause for which the said city would be liable, and such defect, incumbrance, or other cause of such injury shall arise from or be produced by the wrong, default, or negligence of any person or corporation, such person or corporation so guilty of such wrong, default, or negligence shall be primarily liable for all damages for such injury; and the said city shall not be liable therefor until after all legal remedies shall have been exhausted to collect such damages from such person or corporation."

This act has been under consideration in *McFarlane v. Milwaukee*, 51 Wis. 691; *Hincks v. Milwaukee*, 46 Wis. 559. This provision of the city charter was declared valid and

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constitutional by this court in the case of *Hincks v. Milwaukee*, *supra*, and in that case a construction was given to it defining and limiting its application. The chief justice, who wrote the opinion in that case, says: "The plaintiff contends that this section does not apply to a case where the defect or obstruction in the street is produced by a party constructing a sewer or making some public improvement under a contract with the city; but was intended to include a case where the obstruction was placed in the street by the owners of adjoining lots while making some improvement for their own convenience or benefit, with which the city had nothing to do. We are inclined to think that this construction of the section is the proper one, and that it has no application to the case stated in the complaint. True, the language is quite broad; it speaks of a defect or other cause of injury produced by the wrong, default, or negligence 'of any person or corporation.' But these general words must, we think, be restricted to a case where the party causing the defect holds no contract relation with the city; as where the owner or occupant of the adjoining lot creates the nuisance, as in *Hundhausen v. Bond*, 36 Wis. 30, and where the city would otherwise be primarily liable to make such compensation in the absence of such a provision."

In *McFarlane v. Milwaukee*, *supra*, it was held that when the owner of an adjoining lot placed the dirt excavated from a cellar dug upon his lot in the street, without any authority from the city, such dirt so placed being the obstruction which caused the injury to the plaintiff, the case was within the statute, and no action could be maintained against the city without first bringing an action against the owner of the lot, who placed the dirt in the street. In the case of *Amos v. Fond du Lac*, 46 Wis. 695, under a similar provision of the charter of that city, it was held that the law did not apply to a case where an injury resulted from a defect in a sidewalk, not arising out of any partic-

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ular or private use of such walk by the adjoining owner or occupant, although the charter required the adjoining owner or occupant to put the same in repair when notified so to do by the proper city authorities, unless the accident happened after a proper notice to repair had been given, and the time for making such repairs had expired before the accident occurred.

We think there can be no doubt, either upon authority or principle, that a person who places an obstruction in a street or sidewalk, when so placed for his private purposes or convenience, is liable to every person who shall, without his own fault, be injured by reason of such obstruction, notwithstanding the city may also be liable for such injury for permitting such obstruction to remain in such street or sidewalk. See the list of cases cited by the learned counsel for the appellant in their brief in this case. This question was fully considered by this court in *West Bend v. Mann*, 59 Wis. 69, in which most of the cases cited by the learned counsel for the appellant were referred to by Justice CASSODAY in his opinion, on page 72.

It must be considered settled law that an owner or occupant of a lot in a city who makes an opening in a sidewalk in front of such lot for his sole use and convenience, whether made with or without the assent of the city authorities, is under obligation to the public as well as to the city to see to it that such opening is kept securely covered or otherwise protected, so as to prevent injury to travelers upon such sidewalk, and that such owner is liable in damages to any and all persons traveling such sidewalk who may receive any injury by reason of the neglect of such owner or occupant in keeping such opening properly and securely covered or otherwise protected.

We are also of the opinion that if the evidence in the case at bar clearly established the fact that the injury to the plaintiff was caused solely because the owner or occupant of

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the lot adjoining the sidewalk where the accident happened neglected to keep the trap or door over the hole referred to in such walk in good repair and safe condition, then such owner or occupant would be primarily liable to the party injured, and no action could be maintained against the city by the plaintiff until an action had been first commenced against such owner or occupant, and an attempt made to recover her damages of him; that such an obstruction or defect in the sidewalk is a defect or incumbrance of such sidewalk within the meaning of the provision of the city charter, above quoted, as construed by this court in the cases above cited. The learned counsel for the city, adopting this view of the case, insists that the judge of the county court erred in his instructions to the jury, as well as in refusing to give the instructions asked by the city.

The first instruction given to which exception was taken we think is good law, and no error was committed in giving it to the jury.

If, by the following part of the second instruction excepted to, viz.: "If such opening was so made and secured and brought down to an equal surface with the walk, and if the walk itself was then safe and secure, and the door over the same was so fastened and was as firm as the walk, then the city, in the absence of any corporate action opposing the building of the same, or any opposition thereto, and permitting the public to use it, must be regarded as adopting this trap-door as a part of the walk, and was under obligation to keep it, as well as the rest of the walk, in safe and suitable repair and security for public travel, and it would be liable for any damage resulting to a person lawfully walking over the same from such want of repairs," etc.,— it is meant that if the trap-door in the walk made for the owner's use and convenience solely was originally made safe and secure, there rested no obligation or duty on such owner or occupant, either towards the city

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or the public, to see that thereafter such trap-door was kept in a safe and secure condition, then such instruction was erroneous, and ought not to have been given to the jury, if there was sufficient evidence in the case to call for the submission of the question to the jury whether the injury to the plaintiff was caused solely by the neglect of the owner or occupant of the lot in keeping such trap over the opening in the walk in a safe and secure condition.

Whether the third instruction excepted to was erroneous depends upon the evidence in the case, and it is correct if there is not sufficient evidence in the case to justify the submission of the case to the jury on the theory that the negligence of the owner or occupant of the lot in not keeping the trap in repair was the sole cause of the injury.

The fourth, fifth, and sixth instructions are not erroneous, because there can be no doubt of the liability of the city to the plaintiff if the injury occurred through the neglect of the city to keep the sidewalk generally in repair outside of the trap or hole in the walk.

The first and third instructions asked and refused we think were properly refused, as there does not appear to be any evidence in the case showing that the sidewalk was originally constructed above the surface of the ground for the convenience or use of the occupant or owner of the lot. The presumption from the evidence is that it was so constructed to bring it to the grade established for the walk at that place.

The second instruction asked should have been given if there was sufficient evidence in the case to justify the jury in finding that the accident happened solely on account of the want of repair of the trap.

The fourth instruction asked was properly refused upon the facts established in the case. The instruction asks the court to charge the jury that it was the absolute duty of the owner or occupant to keep the supports of the trap in re-

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pair. It might not be his duty to do so when the supports of the trap were also the supports of the adjoining sidewalk, and it appears from the evidence that it was so supported in this case.

After a careful reading of the evidence in the case we think it clearly appears that the accident happened by reason of the want of repair of the sidewalk itself; at all events that such want of repair of the sidewalk contributed directly to the accident; and if such sidewalk had been in a reasonably safe condition the accident would not have happened on account of any shown defect in the trap-door, or by reason of any dangerous position of such door at the time of the accident. Under such a state of the proofs we think the court was justified in refusing to submit the question to the jury upon the theory that the neglect of the adjoining owner or occupant to keep such door in a secure and safe condition was the sole cause of the plaintiff's injury. If such neglect was not the sole cause of the injury, then the case does not come within the provisions of the charter above quoted, and the action was rightly brought against the city in the first instance.

Where the actual neglect of the city concurs with the neglect of the owner or occupant in causing the injury, the action may be brought in the first instance against one or both of the wrong-doers, and it is no defense to an action brought against either that the wrongful act or negligence of the other contributed to the injury. See *Stetler v. C. & N. W. R. Co.* 46 Wis. 497, 507, 508. We use the words "actual neglect" so as to distinguish it from that neglect of the city which may be implied by reason of its permitting the owner of the lot to maintain a dangerous opening in the walk, and for which the city would be primarily liable to the party injured thereby were it not for the provisions of the charter above quoted. This is in harmony with the construction given to this act by this court in *McFarlane v. Milwaukee*, 51 Wis. 691.

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We think it is very clear from the whole evidence in the case that the accident would not have happened if the city had performed its duty in keeping the supports under the sidewalk, at the place where the trap was maintained in the walk, in suitable repair. Any errors of the learned county judge in giving and refusing instructions upon abstract principles of law not applicable to the facts which must control the verdict, could not have prejudiced the city.

By the Court.—The judgment of the county court is affirmed.

MUNKWITZ, Respondent, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

October 17 — November 3, 1885.

RAILROADS: CONDEMNATION OF LAND. *(1) Speculative damages: Estimates of value based on future contingencies. (2) View. (3) Evidence: Award of commissioners.*

1. Estimates by witnesses of the damage done to land (most of which was under water) by the construction of a railroad across it, based upon the fact that such railroad would prevent the dredging of a canal along the whole length of the tract, by which the land could be filled up and rendered available for business purposes, are *held* improper to be considered in assessing the compensation to be made to the owner, where it further appears that such canal could not in any case be made unless it could be connected with an extension of an existing canal, and that the making of such extension is uncertain, depending upon the acts and will of other persons and upon many contingencies.
2. The fact that the jury also viewed the premises cannot of itself sustain an assessment based upon such estimates.
3. Evidence as to the amount awarded by commissioners of appraisal is not admissible on the trial of an appeal from such award. [But where one of the commissioners who joined in the award is a witness on such trial, it may be proper to call his attention to the amount of the award for the purpose of affecting the weight of his testimony.]

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APPEAL from the County Court of *Milwaukee* County.

The case is sufficiently stated in the opinion. The defendant appealed from a judgment in favor of the plaintiff.

John W. Cary, for the appellant, to the point that the amount awarded by the commissioners was not admissible in evidence, cited *Wooster v. S. R. V. R. Co.* 57 Wis. 311; *Watson v. M. & M. R. Co.* id. 332, 340; *Ennis v. W. R. B. R. Co.* 12 R. I. 73; *Sherman v. St. P., M. & M. R. Co.* 30 Minn. 227; *Central Bank v. St. John*, 17 Wis. 157; *Caswell v. C. & N. W. R. Co.* 42 id. 193; *Brown v. P., W. & B. R. Co.* 5 Gray, 35. To the point that remote, speculative, or conjectural damages should not be allowed, he cited, besides cases cited in the opinion, *Robbins v. M. & H. R. Co.* 6 Wis. 642; *Hutchinson v. C. & N. W. R. Co.* 37 id. 610; *S. C.* 41 id. 555; *Mount Washington Road*, 35 N. H. 134; *Searle v. L. & B. R. Co.* 33 Pa. St. 57; *Patten v. N. C. R. Co.* id. 426; *Selma, R. & D. R. Co. v. Keith*, 53 Ga. 178; *Jones v. C. & I. R. Co.* 68 Ill. 380; *Jacksonville & S. E. R. Co. v. Walsh*, 106 id. 253; 3 Sutherland on Damages, 442; Pierce on Railroads, 216, 217.

For the respondent there was a brief by *Nath. Pereles & Sons* and *E. P. Smith*, and oral argument by *Mr. Smith*.

ORTON, J. This was an appeal from the award of commissioners of damages to the plaintiff's land by the right of way across it of the defendant's railway. The jury found the damages separately at $2,000 for the land actually taken, and $4,000 as damages to the land adjoining. There was a motion for a new trial on the ground that the $4,000 damages were not supported by competent evidence. It seems that the witnesses who estimated such damages based their judgment almost entirely upon the fact that the railway crossing said lands would prevent the excavation of a canal the full length of said tract, by which such adjoining lands could be filled up and made available for business

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purposes (the same being now mostly under water); and such canal cannot be so excavated without connection with an extension of the South Menomonie canal, west of Muskego avenue, and on the south side of said tract, which extension may or may not in the near future, or ever, be made, and which depends upon the will and acts of other persons, or the action of the public authorities, and is yet a mere project or scheme, depending on many uncertain contingencies. It is too clear for argument that such damages are too hypothetical, conditional, and contingent to be estimated with any certainty whatever. Such damages by reason of the railway may or may never exist. On this theory, these adjoining lands may or may never be depreciated in value by the railway. As I understand the testimony of other witnesses who estimated some damages to the adjoining lands by reason of the railway, they did so by considering them suitable for stock-yards after they are filled by means of said canal, which cannot be made unless it can have connection with the Menomonie canal so extended. Such damages are in the highest degree uncertain and speculative, and sanctioned by no authority cited by the learned counsel of the respondent, or that can be found.

The learned counsel on both sides cite the same authorities to sustain their adverse and opposite positions as to the true ground of estimating damages in respect to future and expectant conditions of this kind. These authorities do not appear to be difficult to understand. In *Snyder v. W. U. R. Co.* 25 Wis. 60, the controversy was as to the damages to the lands adjoining those actually taken, arising from the inconvenience and trouble of crossing the railroad in going from one part of the land to another with cattle and agricultural implements, and the danger to person and property, and exposure to fires, frightening teams, etc. Such damages were liable to occur at any time from present conditions, and were said in that case not to be remote and

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speculative. In *Washburn v. M. & L. W. R. Co.* 59 Wis. 379, the damages were allowed to be estimated from the *present* adaptability of the lands to uses to which they might be put in the future, as that they might be platted into city lots. The rule in *Boom Co. v. Patterson*, 98 U. S. 410, is that the jury might estimate the value of the land "for the most advantageous use to which it may be applied." This rule limits the estimate to present and certain adaptability, independent of future contingencies and conditions uncertain and speculative.

These cases are especially relied upon to sanction the grounds of the estimate in this case, which were the building of a canal on the south side of this tract by other persons or by the public authorities, some time in the remote future, which may or may not be done, and the feasibility of excavating through the tract a canal in connection with such expected canal for the purpose of filling it up and making it available for business purposes, which would be prevented or obstructed by the railroad. The cases are very wide apart. The intervention of the South Menomonie canal is an element and a condition over which the owner of these lands has no control, and it is therefore impossible for him to render the same certain, either at present or in the future, as a basis of value.

In *Watson v. M. & M. R. Co.* 57 Wis. 332, in commenting on the charge of the court and instructions asked, Mr. Justice TAYLOR uses the following language, specially applicable to the above testimony: "The evidence of the probabilities of any part of the lands taken being more valuable for the use relied upon by the appellants were so remote, and *depended so much upon matters resting in the volition of persons over whom the appellants had no control*, we think the court did its entire duty when it permitted the appellants to present their theory of the evidence and argue it by counsel to the jury, without making it a matter of special

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comment in his charge." The following charge was specially approved: "What was the fair market value of the land *at that time for any purpose* for which it might be reasonably used in the *immediate* future? Not what would lots sell for *in the distant future if a street were opened* and lots offered for sale," etc. This same limitation of the conditions of the land is made in many earlier cases in this court. In *Welch v. M. & St. P. R. Co.* 27 Wis. 108, Chief Justice DIXON said in his opinion: "And whilst speculative damages cannot be allowed, yet actual damages — its value to the *owner*, *his* use being considered, must always be. And in such case it will not do to say if the land was separately owned, or separately used, or intended for some other purpose, or belonged to some one else, the damage would be so much the less, and therefore no more can be recovered. The actual use and *intention of the proprietor*, together with all surrounding circumstances, must be considered." See, also, *Driver v. W. U. R. Co.* 32 Wis. 569; *Pinkham v. Chelmsford*, 109 Mass. 225; *Fairbanks v. Fitchburg*, 110 Mass. 224; *Powers v. H. & L. R. Co.* 33 Ohio St. 429. But it is needless to cite other authorities, as all seem to agree that such damages are too remote and speculative to be estimated in such a case.

The learned counsel of the respondent contends that as the jury were allowed to view the premises their estimate cannot be reviewed. The view of the premises by the jury is for the purpose of assisting them in weighing and applying the evidence, and notwithstanding their view their estimate must be supported by the evidence in the case. *Neilson v. C., M. & N. W. R. Co.* 58 Wis. 523; *Washburn v. M. & L. W. R. Co.* 59 Wis. 379. It is clear that the damages to the land contiguous to that actually taken, by reason of the railway, were estimated by the witnesses at $4,000, in view of such uncertain contingencies as were not proper to be considered for such purpose, and that the verdict and

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judgment to that extent rested upon such improper evidence, and are therefore erroneous.

It is assigned as error by the appellant to have asked the witness Dahlman, who was one of the commissioners, what was the amount of the award. That would have been error if the witness had been so asked merely to affect his own estimate of the damages, for the award has nothing to do with the case on trial, and the appeal opened the whole case for new evidence. *Wooster v. S. R. V. R. Co.* 57 Wis. 311. But the witness had given an opinion adverse to the award, and he was being cross-examined, and it might have been proper to call his attention to his award for the purpose of affecting the weight of his testimony if he had joined in the award. In that view we could scarcely say that it was improper and erroneous. But as he had not joined in the award the question was improper.

The motion for a new trial should have been granted.

By the Court.—The judgment of the county court is reversed, and the cause remanded for a new trial.

MANTZ, Respondent, vs. WERNER, Appellant.

October 17 — November 3, 1885.

PRACTICE: CHANGE OF VENUE. *(1) Filing of record in court to which cause is sent: Payment of fees. (2) Extending time to transmit record: Notice of motion.*

1. When the place of trial of an action is changed, the clerk of the court to which the papers are sent is under no legal duty to file them unless the prescribed fees are paid; and if, because such fees are not paid, the papers are not filed within twenty days from the making of the order changing the place of trial, such order will be deemed vacated, under sec. 2627, R. S. A custom of the clerk not to exact the fees in advance, but to charge them to the attorneys of the party obtaining the change, will not alter the rule.

[2. Whether the time for the transmission of the record can be enlarged, after its expiration, by an *ex parte* order, is not determined.]

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APPEAL from the Circuit Court for *Milwaukee* County.

Action for libel, commenced in the circuit court for Calumet county. The venue was changed upon the application of the plaintiff, on the ground of prejudice of the judge, to Manitowoc county. Afterwards the plaintiff applied for a change of venue to Milwaukee county for the convenience of witnesses. This application was opposed by the defendant on the merits and on the ground that it came too late not only because of the long lapse of time but because the plaintiff knew, at the time the venue was first changed, all the facts stated in his affidavit for the second change. The application was granted and an order changing the place of trial to Milwaukee county was entered October 7, 1884. The record, however, was not sent to Milwaukee county until November 15, and was afterwards, at the request of the plaintiff's attorneys, returned to the clerk of the circuit court for Manitowoc county.

On November 21 an order was made by the circuit court for Manitowoc county, extending the time for transmitting the record to Milwaukee county until November 25. The record was then transmitted and was received by the clerk of the circuit court for Milwaukee county on November 25, but as the prescribed fees had not been paid was not filed until November 28, when the clerk charged the fees to the plaintiff's attorneys.

The defendant filed objections to the circuit court of Milwaukee county taking jurisdiction of the cause, and moved to remand the same to Manitowoc county. From an order denying such motion the defendant appealed.

The cause was submitted for the appellant on briefs by *J. S. Anderson*, attorney, and *Finches, Lynde & Miller*, of counsel, and for the respondent on the brief of *Davis, Riess & Shepard.*

For the appellant it was argued, *inter alia*, that the order dated October 7, was vacated *ipso jure* on October 27. R. S.

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sec. 2627; *Lee v. Buckheit*, 49 Wis. 54. The order of November 21, extending the time to transmit the record was void because the court had lost jurisdiction by the transmission of the record to Milwaukee county. *Haas v. Weinhagen*, 30 Wis. 326. If the papers are transmitted too late, or the venue is improperly changed, a party waives the defect unless he moves to remand on that ground. R. S. sec. 2628; *Carpenter v. Shepardson*, 43 Wis. 412; *Estate of Schœffner* 45 id. 614. See, also, *Goodhue v. People*, 94 Ill. 37; *Fisk v. A. R. Co.* 41 How. Pr. 365; *Toledo, W. & W. R. Co. v. Wright*, 68 Ind. 586; *Duncan v. State*, 84 id. 204; *Powers v. State*, 87 id. 144. The only way to have the record brought again into the court which ordered the change is by motion in the court to which the change was made to remand the papers. *Johnson v. Von Kettler*, 66 Ill. 63; *Rogers v. Watrous*, 8 Tex. 62. The order of November 21 was also irregular because granted without notice and contrary to the provisions of sec. 2831, R. S. The distinction between enlarging the time within which a proceeding must be taken, before its expiration, and permitting a proceeding to be taken after the expiration of the time, must be borne in mind. In the latter case the order should be granted only upon due notice, in order that the court may exercise its discretion and determine what terms would be just.

For the respondent it was contended, among other things, that the order of November 21 was regular. *Cartright v. Belmont*, 58 Wis. 370. And the record was transmitted in due time under that order. A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file. 13 Viner, Abr. 211; 1 Littleton, 113; Hawkins, Pl. Cr. 7, 207. The clerk of the Milwaukee circuit court received these papers and placed them among the papers of his office, to be kept there on file, subject to his ascertaining who was chargeable with his fees. When he learned that, he should have marked the papers "filed Nov.

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25, 1884," because he *then* received them *for filing*. Jurisdiction is not lost by a dereliction of duty on the part of the clerk. *Moyer v. Strahl*, 10 Wis. 83; *Reed v. Acton*, 120 Mass. 130; *Engleman v. State*, 2 Ind. 91; *Bishop v. Cook*, 13 Barb. 326. And see *Sucterlee v. Sir*, 25 Wis. 357; *Gorham v. Summers*, 25 Minn. 81.

COLE, C. J. The motion to remand this cause to the circuit court of Manitowoc county should have been granted. Assuming, as we may do for the purposes of this appeal, that all the proceedings to change the place of trial were regular up to the time the order dated November 21, 1884, was obtained, still that order only extended the time for the transmission of the record to November 25, 1884. But the record was not actually filed with the clerk of the circuit court of Milwaukee county until the 28th of November, three days after the extended time had expired. The change was not complete until the record was filed with the clerk. Sec. 2627, R. S. It is true the record was received by the clerk on the 25th of November, but it was not filed by him because the fees were not paid. The clerk of the circuit court of Milwaukee county is paid a salary, and the fees provided by law for the clerks of the circuit courts of other counties are received and accounted for by him under oath to the treasurer of the county quarterly. Ch. 311, P. & L. Laws of 1862. The failure or neglect of the clerk to collect and thus account for the prescribed fees constitutes a breach of his official bond. By ch. 451, P. & L. Laws of 1871, it is provided that there shall be paid to said clerk at the time of the commencement of each action or proceeding instituted in the circuit court or county court, or upon filing the original papers in any suit or proceedings in either of said courts, upon an appeal from an inferior court, or upon a change of venue from some other county,—except in criminal cases,—the sum of two dollars, in addition to

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the state tax and county tax required to be paid. In view of these very stringent provisions, it was plainly not the duty of the clerk to file the record before the proper fees were paid.

It is said when the plaintiff had the record delivered to the clerk pursuant to the order, there his duty and power in respect to it ended. But this is a mistake. It was the plaintiff's duty to pay the clerk the prescribed fees for filing the papers. The clerk was under no legal duty to file them until such fees were paid. And the jurisdiction of the court would not attach in the case until the papers were filed.

It is stated in the affidavit of one of the plaintiff's attorneys, which was used in resisting the motion to remand the cause to Manitowoc county, that the clerk had always treated the firm of which he is a member as responsible for all fees and dues chargeable in any case against the party for whom the firm are attorneys of record, and has never demanded or exacted payment in advance for any such fees. Such a practice between the clerk and attorneys is not deserving of judicial condemnation, if the clerk chooses to observe it, and is willing to become personally responsible for the fees to the county treasurer. But the law is clear and mandatory that the prescribed fees must be paid the clerk upon filing the original papers on a change of venue; consequently, the clerk was guilty of no dereliction of duty because he did not file them when they were delivered to him. The law made it the plain duty of the party procuring the change to pay these fees as a condition to the papers being filed. This was not done within the time limited in the order.

In the view we have taken of the case, it is unnecessary to consider whether the order changing the place of trial from Manitowoc to Milwaukee county was a proper exercise of discretion on the part of the circuit court; or whether

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the time for the transmission of the record could be enlarged by an *ex parte* order after the original twenty days had expired. These points are quite fully argued on the briefs of counsel, but we express no opinion upon them at this time.

By the Court.— The order of the circuit court is reversed, and the cause is remanded with directions to send the case to Manitowoc county for trial.

COMDOHR, Respondent, vs. COLEMAN, Appellant.

October 18 — November 3, 1885.

Appeal from J. P.: Failure to bring to hearing: Dismissal.

The mere fact that the respondent in an appeal from a justice expressed an anxiety to settle the cause and talked to the appellant about such settlement, will not excuse the failure of the latter to notice the cause for trial and bring it to a hearing before the end of the second term after the return of the justice is filed; and upon such failure, the appeal, unless continued by special order for cause shown, must be dismissed. Sec. 3766, R. S.

APPEAL from the County Court of *Milwaukee* County.

The case is thus stated by Mr. Justice CASSODAY:

"June 28, 1884, the plaintiff obtained a judgment against the defendant before a justice of the peace. July 1, 1884, the defendant appealed therefrom to the county court. August 22, 1884, the appeal was noticed for trial at the September term of that court, and placed upon the calendar for trial at that term, but was continued at the request of the plaintiff and by the consent of the defendant. Thereafter, and about the time for noticing the cause for trial at the December term of said court, the plaintiff called upon the defendant and his attorneys, and expressed his anxiety to have the cause settled. The plaintiff and defendant had several interviews directly and indirectly in reference

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to a settlement, but no settlement was ever consummated. By reason of the plaintiff's said conduct and anxiety for a settlement, the cause was not noticed for trial, nor put upon the calendar of the December term of said court for 1884, nor brought to a hearing by either party during that term, nor during the March term of said court for 1885. April 27, 1885, the plaintiff gave notice to the defendant of a motion, to be made at the opening of the court May 11, 1885, or as soon thereafter as counsel could be heard, upon an affidavit stating the facts, and upon the papers, records, and proceedings on file, for an order dismissing the appeal in the case, on the ground that said appeal had not been brought to a hearing within the time required by law. June 6, 1885, the court ordered that said appeal be, and the same was thereby, dismissed with costs against the plaintiff. From that order, and the whole thereof, the defendant appeals."

For the appellant there was a brief by *Nath. Pereles & Sons* and *E. P. Smith*, and oral argument by *Mr. J. M. Pereles.*

John A. Wall, for the respondent.

CASSODAY, J. Neither party brought the appeal to a hearing in the appellate court before the end of the second term after the filing of the return of the justice therein, as required by the statute. Secs. 2847, 3766, R. S. Merely noticing the cause for trial at the first term after the filing of the return was not the bringing of the appeal to a hearing within the meaning of that section. *Holt v. Coleman*, 61 Wis. 422. Nor was the continuing of the cause at that term by consent of the parties the bringing of the appeal to a hearing within the meaning of that section. *Ibid.; Platto v. W. U. Tel. Co. ante*, p. 341, in which an opinion is filed herewith. The appeal was not continued by special order for cause shown during the second term, nor even

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during the third term. *Ibid.* Nor was the neglect to notice the cause for trial at the second term excused by any proper showing within the rulings of this court. *Howe v. Elliott*, 24 Wis. 677; *Pinger v. Vanclick*, 36 Wis. 141. The mere fact that the respondent in the appeal from the justice expressed an anxiety to settle the cause, and talked to the defendant about such settlement, was no excuse for the appellant's failure to notice the cause for trial. Except in the cases mentioned, the statute is peremptory, and requires that "such court shall dismiss the appeal." While such is the statute, we have no alternative but to give it effect.

By the Court.—The order of the county court is affirmed.

NOYES, Respondent, vs. THE NORTHWESTERN NATIONAL INSURANCE COMPANY, Appellant.

October 19 — November 3, 1885.

Insurance against fire: "Contained in": Wearing apparel removed for repairs: Increase of risk.

A seal-skin dolman which was insured as wearing apparel by a policy describing it as "contained in" a certain dwelling-house, was burned while in the store of a furrier to which it had been sent for repairs. *Held*, that the insurer was liable, although the risk of loss was greater in such store than in the dwelling-house designated.

APPEAL from the County Court of *Milwaukee* County.

The defendant issued to the plaintiff its policy of insurance, by which it insured him against loss by fire to the amount of $2,000, as follows: "On household furniture, useful and ornamental, beds, bedding, linen, family wearing apparel, printed books and music, silver plate and plated ware, pictures, paintings, engravings, and mirrors, and their frames, at not exceeding actual cost, pianoforte, and sewing-machine, if any, fuel and family provisions, all contained

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in the two-storied frame dwelling-house occupied by the assured, and known as 302 Farwell avenue, Milwaukee, Wisconsin." During the term of the policy the plaintiff sent a seal-skin dolman, which was part of the wearing apparel thus insured, to the store of T. A. Chapman & Co., in the city of Milwaukee, for repairs. The dolman was originally purchased by the plaintiff of that firm, and that was a proper place to send it for such purpose. When not in use, the usual place of deposit of the dolman was in the dwelling-house, 302 Farwell avenue, designated in the policy. On the same day the dolman was so sent for repairs, and before it could have been repaired in the usual course of business, the store of Chapman & Co., and its contents, including the dolman, were destroyed by fire.

This is an action on the policy to recover for such loss. On the above facts the county court found as conclusions of law as follows: "*First.* That the words 'contained in,' as used in said policy, are to be construed with reference to the property to which they are to be applied,—in this case a part of the family 'wearing apparel,'—and mean that the dwelling-house of the plaintiff was the usual place of deposit of such wearing apparel, when not absent therefrom for temporary purposes incidental to its customary use and enjoyment. *Second.* That the taking and leaving of said dolman at the store of T. A. Chapman & Co., as above found, was incidental to the ordinary and customary use and enjoyment of such property, and the same was not absent from its usual place of deposit in the plaintiff's dwelling-house an unreasonable length of time. *Third.* That the plaintiff is entitled to recover against the defendant the value of said garment so destroyed by fire, to wit: the sum of $250, with interest on the same from the 24th day of October, A. D. 1884, and the costs of this action." The defendant appeals from the judgment for the plaintiff entered pursuant to such conclusions of law.

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For the appellant there was a brief by *Jenkins, Winkler & Smith*, of counsel, and oral argument by *C. H. Van Alstine*. To the point that as a general rule the words "contained in," as applied to a description of personal property in an insurance policy, restrict the risk to the place mentioned, they cited *Wall v. E. River Mut. Ins. Co.* 7 N. Y. 370; *Boynton v. C. & E. Mut. Ins. Co.* 16 Barb. 254; *Bryce v. Lorillard F. Ins. Co.* 55 N. Y. 240; *Iron Foundry v. H. S. & Mut. F. Ins. Co.* 1 Cliff. 300; *Harris v. Royal Can. Ins. Co.* 53 Iowa, 236; *N. Amer. F. Ins. Co. v. Throop*, 22 Mich. 146; *Lycoming Co. Ins. Co. v. Updegraff*, 40 Pa. St. 311, 321; *Hartford F. Ins. Co. v. Farrish*, 73 Ill. 166; *Sampson v. Security Ins. Co.* 133 Mass. 49; *Hews v. Atlas Ins. Co.* 126 id. 389; *English v. Franklin Ins. Co.* 21 N. W. Rep. 340; *A. & E. R. Co. v. Baltimore Ins. Co.* 32 Md. 37; Wood on Fire Ins. 109–112. The right of removal for repairs, if it existed, was restricted to such place as would not materially increase the hazard, as the policy expressly provides that if the risk shall be increased by any means whatever within the control or knowledge of the insured without the assent of the company, it shall be void.

For the respondent there was a brief by *Markham & Noyes*, and oral argument by *Mr. Noyes*. They argued, *inter alia*, that if the words "contained in" admit of two interpretations, that which will sustain the claim of the assured and cover his loss must in preference be adopted. May on Ins. sec. 175; *Sawyer v. Dodge Co. Mut. Ins. Co.* 37 Wis. 524–538; *Wakefield v. Orient Ins. Co.* 50 id. 540. To the point that the construction given by the court below was the proper one, they cited, besides cases cited in the opinion, May on Ins. sec. 219; *Pelley v. Royal Ex. Ass. Co.* 1 Burr. 341; *Carr v. Roger Williams Ins. Co.* 13 Ins. Law J. 443; *Pittsburg R. Co. v. Charlestown M. F. Ins. Co.* 7 Gray, 64; *Farmers' L. & T. Co. v. Harmony F. & M. Ins. Co.* 41 N. Y. 619; *Billings v. Tolland Co. M. F. Ins. Co.* 20

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Conn. 139; *Bond v. Gonsales*, 2 Salk. 445, 443. The same reasoning has frequently been applied in reference to the provision in policies providing that if the premises insured should become "vacant" or "unoccupied" the policy should be void. This provision "is to be construed in view of the situation and character of the property insured, and the ordinary incidents and contingencies affecting the use to which this and other property of like character similarly situated is subject." *Whitney v. Black River Ins. Co.* 72 N. Y. 117; *Cummins v. Agricultural Ins. Co.* 67 id. 260; *Herrman v. Merchants' Ins. Co.* 81 id. 184; Wood on Fire Ins. sec. 184. The distinction between a permanent, or unusual, change in use or location, and a temporary change incident to the ordinary enjoyment, is recognized in *May v. Buckeye Mut. Ins. Co.* 25 Wis. 304, 305; and the duty of a company seeking to limit the operation of its contract, to make such limitations in clear and explicit terms, in *Wakefield v. Orient Ins. Co.* 50 id. 532. See, also, Wood on Fire Ins. secs. 59, 184; May on Ins. secs. 224, 231, 241, 248; *Townsend v. Northwestern Ins. Co.* 18 N. Y. 168. The clause in the policy as to an increase of risk does not pertain to personal property insured, but only "to premises," which means real estate or buildings. See May on Ins. secs 228-243; *Carr v. Roger Williams Ins. Co.* 13 Ins. Law J. 443. It prohibits only a new and different use of the property from that to which it was applied when the policy was issued. *Whitney v. Black River Ins. Co.* 72 N. Y. 122.

LYON, J. The decision of this case turns entirely upon the effect of the words "contained in," as used in the policy to specify the location of the insured property. In a policy upon personal property, which, from its character and ordinary use, is kept continuously in one place, as a stock of merchandise, machinery in a building, household furniture, or goods stored, the rule undoubtedly is that the location of

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the property designated in the policy is an essential element of the risk, and usually a continuing warranty. In such a case the policy covers the goods only so long as they remain in the designated place; and if they are destroyed elsewhere, the insurer is not liable for the loss.

It is maintained by the plaintiff that the rule is not applicable to a case where the insured property is of such a character that its temporary removal or absence from the specified place is necessarily incident to its use and enjoyment, and such use may be presumed to have been in contemplation of the parties when they made the contract of insurance. It is also claimed that in such a case the location of the property is specified in the policy merely to designate the accustomed place of deposit when the property is not absent therefrom in the course of its ordinary use; and if the property be burned when so absent (the place of deposit remaining unchanged), the insurer is liable for the loss.

This is such a case. The dolman was a garment for outdoor wear, and necessarily would be chiefly used away from the designated dwelling-house. It would or might be necessary from time to time to send it to a furrier for repairs; and it was liable to be burned when so absent from the place of deposit. It must be presumed that the parties entered into the contract of insurance in contemplation of these incidents, for they are matters of common knowledge.

Under these circumstances, we think the rule contended for by the plaintiff is eminently reasonable and just when applied to this case. It is abundantly sustained by the adjudications of courts of high authority, supported by arguments which are entirely satisfactory to us. We can only refer briefly to some of the cases.

In *Peterson v. Mississippi Valley Ins. Co.* 24 Iowa, 494, the policy insured, with other property, "seven horses, . . . situated section 22," etc. The policy (like the one

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in suit) contained the usual stipulation that if the risk should be increased by any means, without the assent of the insurer, the policy should become void. The assured, a farmer, while hauling his grain to market with two of the horses, put up for the night at a hotel, distant from section 22. During the night the hotel barn in which the horses were stabled was destroyed by fire, and one of the insured horses was burned to death. Held, that the risk was not limited to the use of the horses on section 22, but extended to the usual and ordinary use of them elsewhere, and that the company was liable for the loss of the horse.

Mills v. Farmers' Ins. Co. 37 Iowa, 400, was a policy insuring "live-stock on premises situated sec. 7, 76, 27." A horse owned by the insured, and usually kept on the designated premises, was killed by lightning at a place six miles distant from such premises, when the owner was driving him to mill. Held, that the insurer was liable.

In *McCluer v. Girard F. & M. Ins. Co.* 43 Iowa, 349, the policy covered a phaeton "contained in a frame barn," and the vehicle was destroyed by fire while at a carriage shop undergoing repairs, and where it was subject to an increased risk. The insurance company was held liable for the loss.

In *Longueville v. Western Assurance Co.* 51 Iowa, 553, the policy covered "family wearing apparel contained in two-story frame dwelling on lot 6," etc. While riding in a sleigh along a street certain wearing apparel of the assured was burned. Held, the loss was recoverable under the policy.

In *Everett v. Continental Ins. Co.* 21 Minn. 76, the property insured was a threshing-machine "stored in barn on sec. 36, T. 23, R. 28, owned and insured by L. L. Chaffin." The machine was burned when standing in a field on that section. The company was held liable. Judge Berry, delivering the opinion of the court, said: "But whatever might have been the purpose of the location of the machine

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in the application and policy, there is no ground whatever for contending that it was, in letter or in spirit, a promissory stipulation on the part of the insured, or a condition of insurance on the part of the insurer, that this location should remain unchanged, or, if changed, that while changed the insurance should cease or be suspended. *Smith v. Mechanics' & Traders' Ins. Co.* 32 N. Y. 399, and cases cited; *Blood v. Howard Fire Ins. Co.* 12 Cush. 472; Fland. Ins. 241, 255, 269, 485."

Holbrook v. St. Paul F. & M. Ins. Co. 25 Minn. 229, is a case in which mules were insured as being all contained in a certain barn. For the purpose of plowing, and also of repairing such barn, they were removed to another barn on another section, where the loss occurred. The company was held liable under the policy for the loss. There is a valuable note to this case by the editor of the Insurance Law Journal (8 Ins. Law J. 793), in which many cases bearing upon this question are cited and commented upon. *London & Lancashire Fire Ins. Co. v. Graves* (Superior Court Ky.), 12 Ins. Law J. 308, is very closely in point. Buggies were insured as "contained in" a certain livery-stable. They were burned while in a carriage factory for repairs. Held, that the absence of the buggies from the designated place of deposit for repairs was an incident of their use and permitted by the policy, and that the insurer was liable.

The same doctrine is recognized by the supreme court of Rhode Island in *Lyons v. Providence Washington Ins. Co.* 12 Ins. Law J. 188; but in that case there was a permanent removal of the insured property from the place designated in the policy, and for that reason the insurer was relieved from liability.

The question we are considering is now first presented to this court. It is doubtless true that there is conflict in the cases in which it has been considered. It is our duty to choose between these conflicting lines of adjudication, and

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to adopt the doctrine which best commends itself to our judgment. We discharge this duty when we hold (as we do) that the words in the policy, "contained in the two-story frame dwelling-house," etc., when applied to the dolman in question, do not constitute a continuing warranty that the same shall always be kept in such dwelling, which would relieve the insurer from liability should it be burned elsewhere; but they are only a warranty that the place designated shall be the usual place of deposit when the dolman should not be in customary use elsewhere, and if burned when in such use it is still covered by the policy, and the insurer is liable. Also that it was a reasonable and proper use of the dolman to send it to the furrier for repairs, and it is immaterial that the risk of loss was greater in the furrier's store than in the dwelling-house designated in the policy. The learned county judge so held, and the judgment is in strict accord with his conclusions of law.

By the Court.— Judgment affirmed.

EILERS, Appellant, vs. WOOD and another, Garnishees, etc., Respondents.

October 19—November 3, 1885.

Justices' courts: Garnishment: Appeal from order requiring payment: Restitution when ordered.

An order of a justice of the peace requiring a garnishee to pay into court for the benefit of the plaintiff the amount of a judgment against the principal defendant, or in default thereof that judgment be rendered against him, is not a judgment; and upon the reversal of such order on appeal, the amount collected on the judgment subsequently rendered cannot be ordered to be repaid under sec. 3772, R. S.

APPEAL from the County Court of *Milwaukee* County. The case is sufficiently stated in the opinion.

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The cause was submitted for the appellant on the brief of *S. W. Granger*, and for the respondent on that of *Howard Van Wyck.*

ORTON, J. The records show that judgment had been rendered by the justice in the action in favor of the appellant, as plaintiff, against S. D. Johnson, defendant, and execution issued thereon, and the respondents had been summoned as garnishees and had made answer, by which the justice found that they were indebted to the defendant in the sum of $61.60. Thereupon the justice, in accordance with sec. 3726, R. S., as amended by ch. 24, Laws of 1883, made an order that the respondents, as such garnishees, pay into the court for the benefit of the plaintiff, within ten days, said sum of $61.60, so found due the defendant in the execution, or in default thereof judgment would be rendered against them. According to said amendment an appeal was allowed from such order "as from a judgment," and the respondents, before said ten days expired, took such appeal to the county court, and gave the undertaking provided for in case of an appeal from a judgment of a justice, which had the effect to stay the issuing of an execution on the same. Secs. 3756, 3757, R. S. After the expiration of said ten days the justice rendered judgment for said $61.60 against said respondents, and issued an execution upon the same, and the respondents paid said judgment under protest. The appeal was afterwards heard in the county court, and the said order of the justice was reversed, and judgment rendered against the respondents for only $17.50 and costs. Thereupon the county court, on the motion of the respondents, made an order requiring the plaintiff to pay to the said respondents the sum of $43, the amount so paid on said execution and judgment of the justice, in excess of said $17.50, interest and costs of the judgment of the county court. This appeal is taken from said order.

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The amendment to the Revised Statutes allowing an appeal from such an order of the justice omitted to provide for staying further proceedings before him, and he proceeded to render the judgment as he supposed the statute required. There seem to be omissions, in the amendment, of important provisions which would prevent such a medley of incongruities as appears in this record. Whether the justice had authority to render said judgment, or whether the same is void or merely erroneous, are questions not necessary to decide on this appeal. But it is clear that said order of the justice is not a *judgment*, for the justice is required to render judgment thereon after the expiration of said ten days, unless the same is complied with. And it is equally clear that the judgment on which the $61.60 was paid was not appealed from, and has never been reversed, lessened, modified, or changed in any respect, but it remains on the docket of the justice satisfied by such payment. The statute under which the order appealed from was made is as follows: "If any justice's judgment, or any part thereof, be collected, and the judgment be afterwards reversed, the appellate court shall order the amount collected to be restored, with interest from the time of the collection. Such order may be obtained upon proof of the facts, upon notice and motion, and may be enforced as a judgment." Sec. 3772, R. S. This statute authorizes a special proceeding to enforce, in a summary manner, the restoration of money collected on a judgment of a justice which was afterwards reversed on appeal, by an order on motion, which may be enforced as a judgment. The common-law remedy in such a case was by action. The statute should therefore have a strict construction, and should not be made to embrace cases not within its provisions. This case is not within its provisions, (1) because no *judgment* of a justice has been collected; (2) no judgment has been reversed; (3) the judgment actually collected has never been appealed or reversed;

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(4) an *order* of the justice only was reversed; (5) the money was not collected on the order, nor was the order complied with by payment. The statute has no application to such a case. Whether the statute has application to any case where there has not been a complete and full *reversal* of a justice's judgment, or where there has been a trial on the merits on appeal and the justice's judgment has been reduced in amount, or judgment rendered for the defendant, we do not decide in this case.

By the Court.— The order of the county court is reversed.

TAYLOR, J., dissents.

JOHNSON, Administrator, etc., Respondent, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

October 19 — November 3, 1885.

Railroads: Negligence: Court and jury: Killing of child at street crossing: Flagman: Damages: Evidence.

1. Upon the evidence in this case it is *held* that the question whether the engineer or fireman on defendant's locomotive could have seen plaintiff's intestate (a boy about seven years old, who was run over and killed by such locomotive at or near a street crossing) so as to have known of his danger before the accident, and the questions of contributory negligence on the part of the deceased or his father, were properly submitted to the jury. [Whether the question of defendant's negligence in not keeping a watchman or flagman at such crossing, should have been submitted to the jury, not determined.]
2. An error in submitting a question to the jury for a special finding is immaterial if the findings upon the questions properly submitted sustain the judgment.
3. Upon the question of damages for the negligent killing of a child, evidence that the parents are poor, in bad health, and obliged to work for a living is admissible; and in such a case the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of the life even beyond minority.
4. A verdict for $2,500 for the killing of a boy about seven years old, is *held* not so excessive as to warrant the interference of this court.

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APPEAL from the Circuit County for *Winnebago* County.

The case is thus stated by Mr. Justice CASSODAY:

"This action is for damages by reason of the death of the intestate, the plaintiff's son, a lad of nearly seven years, who was run over and killed by a switch-engine in a street crossing in Fort Howard. On the first trial the plaintiff was nonsuited and the judgment was reversed on appeal. 49 Wis. 529. The same occurred on the second trial, and the facts are fully stated in 56 Wis. 274.

"On the last trial, the jury returned a special verdict to the effect (1) that the defendant or its employees were guilty of carelessness which caused the death of the intestate; (2) that such negligence was by the defendant not having a flagman or watchman; (3) that the deceased got upon the rear foot-board of the locomotive and rode there to the place where the accident occurred, without the knowledge of any employee of the defendant of his being there; (4) that the deceased and Henry Bitters did not jump from the rear foot-board of the locomotive after the train commenced to move backward, and while in motion, immediately preceding the accident; (5) that the deceased met his death from attempting to cross the track before the moving locomotive; (6) that his presence at the rear of the locomotive was unknown to either the engineer or fireman before the accident; (7) that either the engineer or fireman, in the exercise of ordinary care, could have seen the deceased from their posts of duty, so as to have known of his danger before the accident; (8) that the deceased was not guilty of any want of ordinary care which directly contributed to his death; (9) that the deceased's father was not guilty of contributory negligence; (10) that the defendant was guilty of negligence in not having some one stationed at the crossing to look; (11) that the pecuniary loss which the father of the deceased boy had sustained by reason of his death was $2,500.

"From the judgment entered upon the verdict the defendant appeals."

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For the appellant there was a brief by *Jenkins, Winkler & Smith*, of counsel, and oral argument by *C. H. VanAlstine*. They contended, *inter alia*, that, upon the evidence, the defendant's servants were not guilty of any negligence. Nor was there any negligence in not having a watchman or flagman stationed at the crossing in question. *Houghkirk v. Del. & H. Canal Co.* 92 N. Y. 219; *Haas v. G. R. & T. R. Co.* 47 Mich. 406; *Penn. R. Co. v. Matthews*, 36 N. J. Law, 534–5; *Telfer v. Northern R. Co.* 30 id. 188, 194; *Phil. & R. R. Co. v. Killips*, 88 Pa. St. 412; *Bilbee v. L., B. & S. C. R. Co.* 18 C. B. (N. S.), 584; *Stubley v. L. & N. W. R. Co.* L. R. 1 Exch. 13; *Cliff v. Midland R. Co.* L. R. 5 Q. B. 258; *State v. P., W. & B. R. Co.* 47 Md. 76; *Comm. v. B. & W. R. Co.* 101 Mass. 201; *Welsch v. St. Jos. R. Co.* 72 Mo. 451. The case of *Kinney v. Crocker*, 18 Wis. 74, if not distinguishable, is at variance with the whole current of authority. The deceased was guilty of contributory negligence, as a matter of law, in attempting to cross over the track in front of the moving engine. *Wendell v. N. Y. C. & H. R. R. Co.* 91 N. Y. 420; *Honeysberger v. Second Ave. R. Co.* 1 Keyes, 570. And the father was guilty of contributory negligence in knowingly allowing his child to go unattended by any person of suitable age and discretion in a direction which did not lead to his home, and which he knew did lead in the direction of danger. *Fitzgerald v. St. P., M. & M. R. Co.* 29 Minn. 336; *Cauley v. P., C. & St. L. R. Co.* 95 Pa. St. 398; *Mason v. M. P. R. Co.* 27 Kan. 84; *Hassenyer v. M. C. R. Co.* 48 Mich. 205; *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 441; *Albertson v. K. & D. M. R. Co.* 48 Iowa, 292; *Callahan v. Bean*, 9 Allen, 401; *Gibbons v. Williams*, 135 Mass. 333. It was error to charge the jury that they might take into consideration on the question of damages the probability of any aid the deceased might be to his parents after arriving at the age of twenty-one years. *Penn. Co. v. Lilly*, 73 Ind. 252; *St. Louis, I. M. & S. R. Co.*

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v. Freeman, 36 Ark. 41; *Caldwell v. Brown*, 53 Pa. St. 454; *Lehigh Iron Co. v. Rupp*, 100 id. 95; *Rains v. St. L., I. M. & S. R. Co.* 71 Mo. 164; *State v. B. & O. R. Co.* 24 Md. 84, 107; *Seaman v. Farmers' L. & T. Co.* 15 Wis. 578. The damages awarded were excessive. *Telfer v. Northern R. Co.* 30 N. J. Law, 210.

For the respondent there were briefs by *Tracy & Bailey*, and oral argument by *Mr. Tracy*. To the point that the question of the necessity of a flagman is one for the jury in any particular case, they cited Shearm. & Redf. on Negligence, sec. 483; *Eaton v. Erie R. Co.* 51 N. Y. 544; *Linfield v. O. C. R. Corp.* 10 Cush. 562; *Bradley v. B. & M. R. Co.* 2 id. 539; *Shaw v. B. & W. R. Co.* 8 Gray, 45; *Johnson v. C. & N. W. R. Co.* 1 Am. & Eng. R. Cas. 155–157; *Kinney v. Crocker*, 18 Wis. 75–82.

Cassoday, J. At the place of the injury the defendant's railway track runs in a northeasterly and southwesterly direction. Second avenue runs directly south from the track, and there is a bridge in it near the track. From the north end of Second avenue, Third avenue runs in a northeasterly direction, and Fifth street in a northwesterly direction. Some seventy-two or eighty feet northeasterly from the middle of the highway there is a switch. On the afternoon in question the engine went northeasterly on the main track; and then the forward end of it was attached to twenty freight cars, and then backed southwesterly towards the crossing in question, drawing the twenty cars after it until near the switch, when the engine was uncoupled from the twenty cars, leaving them upon the main track, and the engine was moved southwesterly of the switch, and then back upon the side track, and the front end thereof coupled to "two or three box cars," and with them it backed down upon the main track, and then, on the switch being turned, pushed the "two or three box cars" northeasterly on the

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main track until they reached the twenty freight cars, where they were coupled onto them, and then the whole train was started southwesterly until the last freight car passed the switch, when it stopped. About that time the deceased and his playmate, Bitters, were seen hanging upon the side of one of the box cars, and were driven off, and they went down under the bridge, but when the switch was turned and the train being pushed back upon the side track, the boys came up from under the bridge and got upon the footboard at the hind end of the tender attached to the engine, and continued to ride there until the twenty freight cars were pushed back far enough on the side track to enable trains to pass in safety on the main track, when it stopped. The twenty freight cars were then detached from the box cars.

There is evidence tending to show that while the engine was still moving, and just before it stopped, the deceased and Bitters dropped off the foot-board, upon the ground between the rails of the track, near the middle of the street, or west edge of the sidewalk on the east side of the street, and there remained playing for a little while, until after the engine had started back southwesterly, when they looked up and saw it coming, and then went off the track — the Bitters boy going off on the one side, and the deceased on the other side, but, on seeing the Bitters boy on the opposite side of the track, he turned and started to go across the track towards him, when he was caught before he could get over, and killed.

It is strenuously urged that the evidence conclusively shows that both of the boys either remained on the foot-board until after the engine started back, or else that they remained between the rails, and so near the rear end of the tank that it was impossible for either the engineer or fireman to see either of them upon looking in that direction from their post of duty, before or after starting back. Upon this assumption it is claimed that the seventh finding

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is contrary to the undisputed evidence, and hence that the court should have directed a verdict for the defendant. To establish this claim we are asked, as a matter of law, to wholly disregard the testimony of the only witness as to the distance of the switch from the middle of the street, because the scale of the map indicates that it is eight feet less. We are also asked to hold, as a matter of law, that the boys got off at the edge of the sidewalk, when there is some evidence that they got off near the middle, or within three or four feet of the middle, of the street. We are asked to hold, as a matter of law, that there were three box cars attached to the engine, when one of the defendant's witnesses, the engineer, testified that there were "*two or* three." We are asked to hold, as a matter of law, that the engine only continued to push the cars back upon the side track "until there was one car and about a half, or at least thirty feet, between the engine and the switch," when the testimony upon which it is claimed is very indefinite and uncertain, and is as follows: "When we pushed them ahead on the side track the engine didn't go on the side track. It went, *may be*, within thirty feet of the switch,—the length of a rail. I *think* we had only *three* cars between the engine and the switch. *May be* there was one or one and a half of those cars; *somewhere along there*."

To render this uncertainty more uncertain we may note the fact that the same witness had just before testified that they went on the side track and "got *two or* three box cars." The defendant's engineer testified in effect that these box cars were from twenty-four to thirty feet long; that the engine and tender were twenty-five long; that the engine might have moved back fifteen or twenty feet before the alarm was given by the woman; that he did not think it was much over twenty feet; that he could not exactly say; that when he heard the alarm, he stopped as quick as possible and within a space of eight feet; that he then found the

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boy forward of the forward driving wheel about on the crossing. Both he and the fireman testified that they both looked before starting back and saw no one, and that they could have seen the boys, had they not been within twelve or fifteen feet of the tender before it started back.

There may have been a preponderance of evidence in favor of the defendant's theory, but we cannot say it is conclusively established as a matter of law upon such evidence. The question whether the engineer or fireman might have seen the boys, had they kept a lookout before starting and in the direction of the moving engine, was one of fact for the jury and not of law for the court, upon principles repeatedly held by this court, including the decision of this case upon the former appeal.

Upon the same principles the questions of contributory negligence were properly submitted to the jury.

It is urged that it was error to submit to the jury the question whether, under the facts and circumstances disclosed in the evidence, the defendant was guilty of negligence in not having a flagman or watchman at the crossing, and several of the cases cited sustain this position. It is, however, unnecessary to determine the question here; for, assuming that the law is as claimed, and that the second and tenth findings of the jury should be set aside for such error, yet the balance of the findings sustain the judgment, and hence the error is immaterial.

The last point urged by appellant's counsel is that the damages are excessive. Were we sitting as jurors we should be inclined to agree with him and make them considerably less. But sitting as a court for the correction of errors we cannot say, as a matter of law, that the damages are so excessive as to create the belief that the jury were misled either by passion, prejudice, or ignorance, and hence we are not authorized to interfere. It appeared in evidence that the father of the deceased is a poor man and has been

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troubled with the rheumatism ever since he was quite young, and saws wood for a living, and that the mother at times works out away from home. This evidence was objected to, but seems to be admissible within the rulings of this and other courts. *Potter v. C. & N. W. R. Co.* 21 Wis. 375; *S. C.* 22 Wis. 615; *Ewen v. C. & N. W. R. Co.* 38 Wis. 622, 623; *Regan v. C., M. & St. P. R. Co.* 51 Wis. 600; *Chicago v. Powers*, 42 Ill. 170; *Barley v. C. & A. R. Co.* 4 Biss. 430. These authorities hold that in such a case the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of the life even beyond the minority.

By the Court.— The judgment of the circuit court is affirmed.

THE STATE VS. SCHWARTZ.

October 19 — November 3, 1885.

Criminal pleading: Forgery: Promissory note.

An instrument in the form of a promissory note for the payment of "25.00 as per deed, 10 per cent. till paid," is a note for twenty-five *dollars;* and in an information for the forgery thereof no averment of extrinsic facts is necessary to show that such is its character.

REPORTED from the Circuit Court for *Walworth* County.

The defendant was informed against for the crime of forging a promissory note, and was tried therefor, and convicted. The alleged forgery consisted in altering a valid promissory note. The original note was as follows:

"ELKHORN, May th 28, 1884.

"For value received, three months after date I promise to pay to *Wm. Schwartz*, or order, $5.00 as per deed.

"O. A. BAGGS."

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The alteration consisted in the erasure of the $ mark, and the insertion of the figure 2 in its place, and the insertion at the end of the note of the words "10 per cent. till paid," making the note read thus:

"ELKHORN, May th 28, 1884.

"For value received, three months after date I promise to pay to *Wm. Schwartz*, or order, 25.00 as per deed, 10 per cent till paid. O. A. BAGGS."

The court charged the jury as follows: "If you find beyond a reasonable doubt, as I shall define it to you, that the defendant here, after the witness Baggs had subscribed his name to the paper in controversy, falsely, and without Baggs' consent, altered the writing by erasing a part thereof, and inserting the figure 2 therein, or by inserting the words '10 per cent till paid;' and if you further find that such paper, when so altered, would be and was likely to deceive and mislead third persons, and be likely to be bought and passed in the ordinary course of business as an obligation to pay $25 in money, and that the defendant made such alteration or alterations with intent to injure and defraud any third person,—then your verdict will be guilty of forgery."

The information contains no specific averment that the forged instrument is for the payment of money, but a copy of the instrument is set out therein.

The defendant moved in arrest of judgment, and thereupon the circuit court duly reported the case pursuant to sec. 4721, R. S., for the decision of this court upon the following questions of law:

"*First.* Was the admission in evidence of the note or writing alleged to have been forged, error?

"*Second.* Was that part of the charge of the court to which defendant excepted, erroneous?

"*Third.* Did the erasure by the defendant of the dollar-mark ($) at the left hand of the figure 5 in said paper, and

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the insertion of the figure 2 without further designation as to what the figures 25.00 are intended to represent than may be legitimately gathered from the face of the paper, constitute the crime of forgery?

"*Fourth.* Can this conviction be sustained in the absence of appropriate allegations in the information showing what the figures 25.00 mean or are intended to represent?"

For the state the cause was submitted on the brief of the *Attorney General.* He cited, besides cases cited in the opinion, *Coolbroth v. Purinton*, 29 Me. 469; *Phipps v. Tanner*, 5 Carr. & P. 488; *Rex v. Elliot*, 1 Leach Cr. Cas. 175; *State v. Coyle*, 41 Wis. 267.

A. S. Spooner, for the defendant, cited *People v. Shall*, 9 Cow. 778; *People v. Galloway*, 17 Wend. 540; *Howell v. State*, 37 Tex. 591; *Abbott v. Rose*, 62 Me. 194; *State v. Smith*, 8 Yerg. 151; *People v. Stearns*, 21 Wend. 414; *People v. Fitch*, 1 id. 198; *Carberry v. State*, 11 Ohio St. 410; *State v. Wheeler*, 19 Minn. 98; *Rex v. Knight*, Salk. 375; 2 Russell on Crimes (9th ed.), 710, note; 2 Bishop on Cr. Law, sec. 538; 3 Archb. Cr. Pr. & Pl. (Waterman's ed.), 552; *John v. State*, 23 Wis. 504.

LYON, J. The jury found that the defendant altered the note for five dollars as charged in the information, and that he did so must be regarded as a verity in the case. If the defendant, when he made such alteration, had inserted in the note the $ mark, or had written therein the word "dollars," immediately before or after the figures 25.00, the instrument would, if genuine, be a promissory note for the payment of $25 in lawful money, and such alteration of the original note would have been forgery. This is too plain to require discussion or reference to authorities. In such case all the questions reported by the circuit court would necessarily be resolved against the defendant.

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The controlling question is, therefore, Does the forged instrument purport on its face to be a promise by Baggs, the maker, to pay the defendant twenty-five dollars, although it contains neither the $ mark nor the word "dollars"? If this question be answered in the affirmative, it is entirely clear that such forged instrument was properly admitted in evidence; that there was no error in the instruction which the court gave the jury; that such alteration constituted the crime of forgery; and that the information is sufficient without an averment therein that the figures 25.00 meant twenty-five dollars. On principle and authority we think the question should be answered affirmatively.

Booth v. Wallace, 2 Root, 247, was an action on a promissory note for "thirty-two, twelve shillings and five pence." The court said: "The word 'pounds' after the words 'thirty-two' is necessarily implied, and the omission, it is clear, was owing to the mistake of the scribe who drew the note, and the implication is so clear and strong that it is not necessary it should be averred in the declaration more fully than it is."

In *Northrop v. Sanborn*, 22 Vt. 433, the question arose on an order requesting the drawee to pay the bearer "37.89," without anything else on the face of the order to denote that dollars and cents were intended. The court said, Judge Redfield delivering the opinion: "We think it not necessary to say that the order expressed for 37.89 is so far unintelligible that it is void. The law of the United States Congress establishing our national currency having declared that it shall consist of the dollar as a unit, and the decimal parts of the dollar as dimes and cents, it would seem the necessary legal intendment that a contract expressed in figures should be in the currency of the country. If prefixed by the usual sign ($), no one *could* entertain doubt; and that is nothing but a mark to signify that the national currency is intended. Without that we think the legal intendment is the same."

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Murrill v. Handy, 17 Mo. 406, was an action on a promissory note wherein the makers promised to pay the payee "the sum of fifty-two 25-100, for value received." The word dollars as well as the $ mark, was entirely omitted. It was held that the note on its face was for fifty-two dollars and twenty-five cents. Some stress was laid upon the words "the sum" in the instrument; but we think the word "pay" is equally significant. Other cases to the same effect are cited by the attorney general, although perhaps they are not so directly in point as are those above referred to.

The words "as per deed" in the forged note do not change the character of the instrument. These words merely show that in some deed the maker of the note had incurred the same obligation. The instrument contains all the essential qualities of a promissory note, notwithstanding the reference therein to a deed.

We are entirely satisfied with the doctrine of the cases above referred to, and do not hesitate to adopt it. We hold, therefore, that the forged instrument on its face purports to be a promissory note for the payment of twenty-five dollars, and ten per cent. interest in money, and that no averment in the information of any extrinsic facts was necessary to show that such was its character and legal effect.

Numerous cases were cited in argument by counsel for the defendant, and have been examined. They are chiefly to the point, and in illustration of it, that when the operation of the forged instrument upon the rights or property of another is not manifest or probable from the face of the writing, extrinsic facts showing such operation must be averred in the indictment or information. We have here no case for the application of that rule. It is believed that none of the last-mentioned cases conflict with the doctrine of the cases first above cited, on the authority of which we have determined the character and legal effect of the forged instrument in this case.

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The first and second questions reported by the circuit court must be resolved in the negative, and the third and fourth questions in the affirmative. It will be so certified to that court.

By the Court.—Ordered accordingly.

SCOFIELD and others, Respondents, vs. CLAGGETT and another, Appellants.

October 20—November 3, 1885.

Sale of chattels: Evidence.

A finding of the trial court that plaintiff contracted to deliver only one car-load of oil to the defendant, is *held* to be sustained by the evidence.

APPEAL from the Circuit Court for *Winnebago* County.

For the appellants the cause was submitted on the brief of *James Freeman.*

For the respondents there was a brief by *Weisbrod, Harshaw & Nevitt,* and oral argument by *Mr. Weisbrod.*

LYON, J. This appeal is by the defendants from a judgment in favor of the plaintiffs. The plaintiffs, who are partners, are refiners of and dealers in oil, at Cleveland, Ohio. The defendants, who also are partners, are druggists and dealers in oil, at Oshkosh, in this state.

In the fall of 1880 the defendants ordered a quantity of oil of the plaintiffs, who sent them a car-load on such order, which the defendants received and paid for, less $124.15. There is no controversy as to the price and value of the oil, but the defendants claim that they ordered from the plaintiffs two car-loads, and they kept back the above sum as damages for the non-delivery of another car-load.

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The plaintiffs deny that they agreed to send more than one car-load, and brought this suit to recover the unpaid balance of $124.15. The only question in controversy in the case is, Did the plaintiffs agree to ship to the defendants two car-loads of oil or but one. The cause was tried by a referee, who found and reported that they agreed to ship but one car-load. The court confirmed the report of the referee, and gave judgment for the plaintiffs for the sum claimed.

The contract between the parties is contained in several letters and telegrams which passed between them concerning the sale and purchase of the oil. These have been examined, and we are unable to find in them any satisfactory proof that the plaintiffs agreed to sell the defendants more than one car-load. We are of the opinion, therefore, that the evidence supports the finding of the referee and the court, and hence that the judgment is right. The case turns entirely upon a question of fact, and it would be useless to state or discuss in this opinion the testimony bearing upon it.

By the Court.—The judgment of the circuit court is affirmed.

WEBSTER, Respondent, vs. WEBSTER, Appellant.

October 20 — November 3, 1885.

Divorce: Division of property: Modification of judgment after term: Equitable division.

1. A judgment of divorce and for a division of the husband's estate, so far as it vests title to his real estate in the wife, is final and cannot be modified by the trial court after the term at which it is rendered.
2. In a case where the husband's estate was of small value, the wife was in feeble health, and the husband was able to earn his own support, it is *held* that it was not inequitable, in granting a divorce to the wife, to set apart to her the homestead, although it was of greater value than the remainder of the estate.

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APPEAL from the County Court of *Milwaukee* County.

Action for a divorce, brought by the wife. A judgment in her favor for a divorce and a division of the defendant's property, was rendered December 22, 1884. February 2, 1885, defendant petitioned for a modification of the judgment, and an order denying such petition was made February 6. The defendant appealed from such order and also from the judgment.

For the appellant the cause was submitted on the brief of *Pike & VanKeuren.*

For the respondent there was a brief by *Weisbrod, Hurshaw & Nevitt,* and oral argument by *Mr. Weisbrod.*

TAYLOR, J. This is an action brought on the part of the respondent against the appellant, demanding a judgment of divorce from the bonds of matrimony and for alimony and a partition of the real estate owned by the defendant in the city of Oshkosh between the plaintiff and the defendant. The charge made against the defendant is his failure to provide a proper support for the plaintiff. The county court found in favor of the plaintiff, granted a divorce, and awarded to the plaintiff the house occupied by the parties as a homestead, and one fourth of an acre of land in said city upon which such house is situated. This house and land is worth the sum of about $1,350, and was all the property awarded to the plaintiff. The evidence tends to show that the defendant had no other property except three fourths of an acre of land in said city of Oshkosh, adjoining the quarter acre set off to the plaintiff, which was worth about $650. There was also a paid-up life insurance policy for $1,040 on the life of the defendant, payable to the wife on his death. The defendant is about fifty-seven years old, and the wife is in feeble health.

It is claimed by the appellant that the partition of the property of the husband between himself and his divorced

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wife is unjust and inequitable, and that this court ought to modify the judgment of the county court and make it more favorable to him in this respect. By his not appealing from the judgment of divorce he admits the justice thereof and his violation of his duty as a husband.

The power of the court to partition the real property of the husband in an action of divorce, and vest the title of a part of such real estate in the divorced wife in lieu of giving her alimony proper, to be paid at stated intervals by the husband, is not denied. This court has frequently declared that such power exists under our laws. *Donovan v. Donovan*, 20 Wis. 586; *Bacon v. Bacon*, 43 Wis. 197, 202; *Hopkins v. Hopkins*, 40 Wis. 462; *Williams v. Williams*, 36 Wis. 367; *Damon v. Damon*, 28 Wis. 510, 516; *Wilke v. Wilke*, 28 Wis. 296, 299. The judgment, so far as it divests the title to the real estate of the husband and vests it in the wife, is final, and cannot be modified on petition to the court making the same after the expiration of the term at which the judgment was entered. See *Bacon v. Bacon*, 43 Wis. 210; *Hopkins v. Hopkins*, *supra*. The order of the county court refusing to modify its original judgment, appearing to have been made at a subsequent term of the court, was properly made, therefore, without regard to the merits of the case. Upon the appeal from the judgment, the part of the judgment divesting the title of the appellant to the homestead and vesting it in the plaintiff may be reviewed by this court, and reversed or modified if found unjust or inequitable. From the record returned to this court, it appears that nearly all the evidence bearing upon this question, contained in the bill of exceptions, was given on the trial of the action, and not in support of the petition for a modification of the judgment. The merits of the controversy are therefore before this court, although we may not be at liberty to consider the evidence produced in support of the petition for a modification of the judgment.

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In the consideration of the question presented by this appeal, it is evident that no general rules can be adopted declaring what part or share of the property of the defendant may be set apart to the wife in an action for divorce in lieu of alimony in a proper sense. A case might occur where it would be eminently proper to divest the title to all the real estate of the husband and vest the same in the wife, especially where the husband is in fault, causing the judgment for divorce. The real estate of the guilty husband may be all his visible property, and that may be of so little value as to furnish a very inadequate provision for the divorced wife, and still she may choose to take that rather than rely on an order of the court requiring the husband to pay alimony. The ability of the husband to earn money for his own support, or for the support of his wife, may be so limited that it would be better for both parties that no order for support be made, and that in lieu thereof the real property be given to the wife.

Every case must depend upon the peculiar circumstances of the parties and the value of the estate of the husband; and when the estate of the husband is of small value, the wife in feeble health, and he has sufficient ability to earn his own support, it does not appear to us inequitable that the homestead should be set apart to her, even though it be of greater value than the remainder of his estate. In the case of *Donovan v. Donovan*, 20 Wis. 586, all the real estate of the husband being a farm of 200 acres of land of the value of $3,000, subject to a mortgage of $900, together with all the household furniture, was set apart to the wife, leaving the husband personal property not exceeding the value of $1,000; and this court say that it appearing that the husband was able to earn his own support, it was impossible for this court to say that "the court did not exercise a sound discretion and apportion the property, real and personal, upon just and equitable principles." The property

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awarded to the plaintiff in this case is a very inadequate provision for her support in her feeble state of health, and had the estate of her husband been of greater value, undoubtedly a much larger provision would have been made for her. We think there is nothing unjust in the award made by the county court, and that the judgment and order appealed from should be affirmed.

By the Court.—The judgment and order of the county court appealed from are affirmed.

ZIELKE, Respondent, vs. THE LONDON ASSURANCE CORPORATION, Appellant.

October 20 — November 3, 1885.

INSURANCE AGAINST FIRE. *(1, 2, 4) Proofs of loss: Waiver: Evidence: Pleading. (3) Mistake or fraud in reducing statement to writing: Pleading: Evidence.*

1. In an action upon a policy of insurance evidence that the plaintiff presented a list of the articles destroyed, with the value of each, to the agent of the company, who examined and returned it without objection to its form or authentication, and that such agent afterwards required the plaintiff to submit privately to a full examination under oath as to the particulars of the loss, and reduced the same to writing, and expressed himself satisfied therewith, and carried the same away and kept it until the trial, is *held* admissible although such facts were not pleaded as a waiver or estoppel.
2. Such facts would amount to a waiver of any further proofs of loss and of all defects therein.
3. Evidence to show that in reducing the examination of the plaintiff to writing the agent of the company had, by mistake or fraud, represented her as saying that she was not the owner of the property insured, and to correct such statement, is admissible although the mistake or fraud was not pleaded.
4. Statements made by the agent of the company to plaintiff's husband (who was her agent to *settle* the loss for her), to the effect that the company was not liable and would not pay anything, are *held* admissible to show a waiver of formal proofs of loss.

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APPEAL from the Circuit Court for *Winnebago* County.

Action upon a policy of insurance against fire. The facts will sufficiently appear from the opinion. The jury returned a special verdict by which they found, among other things, that the defendant's agent did not inform the plaintiff that the examination which she had submitted to from him was not proofs of loss and that proofs of loss must be made by her in accordance with the policy; and that the defendant, by its agent, after the loss occurred, denied all liability and refused to pay the plaintiff the loss under the policy. The jury also found the value of the personal property owned by the plaintiff which was destroyed by the fire. From the judgment entered upon the verdict in favor of the plaintiff, the defendant appealed.

For the appellant there was a brief by *Gary & Berry*, and oral argument by *Mr. Gary*. They contended, *inter alia*, that a waiver of any condition precedent operates as and is an estoppel *in pais*. *Webster v. Phœnix Ins. Co.* 36 Wis. 67. Where the plaintiff relies upon an estoppel to make out his cause of action, it must be pleaded. *Gill v. Rice*, 13 Wis. 549, 556; *Warder v. Baldwin*, 51 id. 450, 459. The only exception to this rule is where the evidence is offered to rebut a defense to which no reply can be made in pleading. *Waddle v. Morrill*, 26 Wis. 611; *Gans v. St. P. F. & M. Ins. Co.* 43 id. 108.

For the respondent there was a brief by *Weisbrod, Harshaw & Nevitt*, and oral argument by *Mr. Weisbrod.*

ORTON, J. The questions raised and discussed on this appeal are mainly of fact and incidentally *only* of law.

1. The complaint alleges that the plaintiff furnished to the company due proofs of loss, and he attempted to prove such allegation by showing that the plaintiff presented in time a long list or schedule of the property destroyed, and

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the value of each article, to the agent of the company, which was examined by him, and returned without objection to the form or authentication thereof, and without requiring any other or further proofs, and at the same time said agent compelled the plaintiff to submit privately to a full examination under oath as to the particulars of said loss, and reduced the same to writing, and expressed himself satisfied therewith, and carried the same away and kept it until the trial. The learned counsel of the appellant contends that such evidence being introduced to prove a waiver of any proofs of loss, and an estoppel of the company to claim the same or to insist upon the performance of such condition, such waiver and estoppel should have been pleaded. We do not understand that such evidence tended merely to prove a complete waiver of any proofs of loss, but rather to prove the making of the proofs of loss required by the policy, in such manner and form as required by the company at the time, as a compliance with the condition of the policy in that respect, and if it showed any waiver it was as to the mere form of the written proofs and their authentication. The long list of the articles destroyed, and showing the value of each, contained all the *substance* of such a list authenticated and made in the form required by the policy, and the personal examination of the plaintiff on oath was provided for by the policy, and was required by the company in addition to the proofs furnished by such list. The question is not so much of a waiver of this condition of the policy as of a substantial compliance with such condition to the satisfaction of the company. But if this is not the true theory of the legal effect of such evidence, the plaintiff could not anticipate that the defendant would deny the allegation of the complaint that due proofs of loss were furnished. In either view the waiver or estoppel was not required to be pleaded by the plaintiff.

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The authorities cited by the learned counsel would be applicable to cases when the cause of action or defense depended mainly upon an estoppel.

2. In reducing the examination of the plaintiff to writing by the agent of the company, she was made to say that she was *not* the owner of the personal property destroyed. On the trial the plaintiff demanded the production of said writing, and then offered to show that such statement therein was a mistake or not true. It is contended by the learned counsel that if that paper was to be attacked for fraud, it should have been pleaded. This question was decided in *McKesson v. Sherman*, 51 Wis. 303, in which it was said that "no good reason is perceived why any instrument may not be attacked as fraudulently obtained, even before and in anticipation of its introduction by the opposite party." In that case the instrument had been misread, when the plaintiff was unable to read, and false statements made therein. In this case the plaintiff had never seen the writing, and did not know its contents, although it purported to be her examination on oath, and she being a German woman, and not understanding much English, when the writing was produced she found that such statement therein was not made by her on her oral examination, and she was properly allowed to testify to the facts in correction of said writing.

3. Fred. Zielke, the husband of the plaintiff, was employed by her to settle the loss for her with one Iott, the agent of the company, and in his interview with Iott for such purpose asked him "what he was going to do about this settlement about the fire business?" and he testified that Iott said in reply that "he wouldn't pay anything what was lost at all;" that "this company was not liable to pay anything for it;" that "the last answer he gave me was that they would not pay anything; the reason was this property was too cheap." The learned counsel contends

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that this testimony was not within such agency to settle the claim of the plaintiff with the company, and therefore inadmissible. The husband, as the agent of the plaintiff for this purpose, certainly had a right to ask the agent what he would do about such settlement; and if that was within the agency, why was not the agent's reply? Suppose the agent had said in reply that the company would pay some part of the claim, would not that have been within the agency to *settle?* And suppose, further, that the agent of the plaintiff said that he accepted such proposition, and would take such part payment in full satisfaction of the plaintiff's claim, would not she have been bound by such a settlement? The answer was as much within the agency as the question. The bare statement of the proposition is sufficient. The jury found on this evidence that the company denied all liability and refused to pay the plaintiff the loss after it had occurred. This finding, if sustained by the evidence, and we think it was, would dispense with the necessity of formal proofs of loss. *McBride v. Republic F. Ins. Co.* 30 Wis. 562; *Parker v. Amazon Ins. Co.* 34 Wis. 363; *Harriman v. Queen Ins. Co.* 49 Wis. 71.

4. The testimony of the plaintiff that she presented to the agent of the company, as proofs of loss, a list or schedule of the property destroyed and showing its value, and that he examined it and made no objection to the form of it or its want of other authentication, but soon thereafter required her to submit to a full examination under oath in respect to such loss; that he carried the same away and expressed his satisfaction therewith, and said it was sufficient and that nothing more would be required of her,—if believed by the jury, would have warranted a finding that such proofs of loss were furnished as called for by the policy, with a waiver of any further proofs, and this evidence, by the decisions of this court, was a waiver of any defects therein. *Killips v. Putnam F. Ins. Co.* 28 Wis. 472; *O'Conner v. Hartford F.*

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Ins. Co. 31 Wis. 160; *Badger v. Glens Falls Ins. Co.* 49 Wis. 389.

There were other points taken, but not important, and they do not affect the merits of the action or the verdict. There was a conflict of evidence between the agents of the company and the plaintiff upon most all material points, and the jury had the right to believe the plaintiff, and, so believing, their verdict was sustained by the evidence. We think the charge of the court was fair and correct, and not liable to the criticisms made upon it in the appellant's brief. We can find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

LAWSON, Administratrix, etc., Respondent, vs. THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellant.

September 3—December 1, 1885.

RAILROADS: NEGLIGENCE: EVIDENCE: AGENCY: DAMAGES. *(1, 2) Riding in dangerous place when not contributory negligence: Instructions to jury. (3) Opinions as to danger. (4) Authority of conductor. (5) Contract by agent: Special instructions. (6) Special contract exempting from liability: Gross negligence. (7) Evidence of degree of negligence. (8) Damages recoverable by widow for death of husband.*

1. Plaintiff's intestate, who, in pursuance of a contract for the carriage of horses, and in accordance with the custom in such cases, was riding in the same car with the horses in order to care for them, was killed in a collision caused by defendant's gross negligence. *Held*, that he would not, as an ordinary passenger who had voluntarily placed himself in a dangerous position, be deemed to have been guilty of contributory negligence.
2. The jury should not be instructed that a person who voluntarily places himself in a dangerous position and thereby contributes to an injury cannot recover for such injury, unless such instruction is qualified so as to embrace the element of common prudence.

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3. The opinions of witnesses as to whether a stock car was a dangerous place for a person to ride, are not admissible.
4. Where it is customary for some person to ride in the same car with horses, to care for them, it would seem to be within the general authority of the conductor of the train to grant permission to a person so to ride for that purpose.
5. If an agent has authority to make a contract, but, in doing so, violates his special instructions as to the mere form of the contract, the other party having no notice of such instructions, the principal is bound.
6. A carrier cannot by stipulations in a special contract wholly exempt itself from liability for an injury resulting from its gross negligence.
7. Although the negligence of the defendant is admitted in the answer, it is not error to admit evidence of the circumstances of the injury complained of, in order to show that the negligence was *gross*.
8. The damages recoverable by a widow suing as administratrix for the death of her husband, will include the value of her support and protection by her husband during the time he would probably have lived and supported her but for his death by the act or neglect of the defendant; and the jury may also consider the addition that the earnings of the deceased would probably have made to his wealth and property had he continued to live, and the reasonable expectation which the plaintiff had of pecuniary advantage by ultimately receiving a share of such earnings as one of his heirs, and damages may be given with respect to that expectation being disappointed, and to the probable pecuniary loss resulting therefrom.

APPEAL from the Circuit Court for *St. Croix* County.

Action to recover damages on account of the death of the plaintiff's intestate, alleged to have been caused by the negligence of the defendant's servants. The substance of the answer, and the principal facts shown by the evidence and found by the jury in their special verdict, are stated in the opinion.

Two men, J. D. Rulien and E. C. Marvin, besides the deceased, rode in a car with the horses. Mr. Fay, who shipped the horses, and Mr. Marvin, were each allowed to testify, against objection, that the latter had a conversation with the defendant's station agent at New Richmond, in the pres-

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ence of Mr. Fay, in which the agent told Marvin that one man could go free with the stock, and that they would better arrange with the conductor as to the other two.

One H. L. Reed, a witness for the defendant, who assisted in rescuing Rulien from the wreck of the car after the collision, was allowed to testify, against objection, that he asked Rulien at that time what the three men were doing in the car, and that Rulien replied "They didn't know we were in there." Afterwards, on plaintiff's motion, this testimony was stricken out.

Upon the question of contributory negligence the defendant requested the court to charge the jury as follows: "If you find that the plaintiff's intestate voluntarily went into a place of known danger, or one apparently dangerous to any person of ordinary intelligence, and remained there, and by reason of being in such dangerous place received his injuries, then he will be guilty of contributory negligence, and the fact — if you should find it to be a fact — that the conductor knew he was there, would not relieve him from contributory negligence."

The court refused the request, but upon the same question charged the jury as follows: "If the place in the car with the stock was so manifestly dangerous as to become apparent to any person of ordinary intelligence that no person of ordinary care and prudence would go and remain there under the circumstances in which deceased was placed, and his going in contributed to the injury, then the consent of the conductor would not justify the deceased in going in. But in passing upon this question of contributory negligence you will consider the circumstances of the case, and the reason deceased had in entering the car in question, and the testimony tending to show the custom of shippers."

Upon the question of damages the court instructed the jury as follows: "The rule of damages, as laid down by our supreme court, is this: If you find for the plaintiff, in

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assessing her damages you must consider the value of the support and protection of the plaintiff by her husband during the time which he would probably have lived and supported and provided for her but for his death from the acts of the defendant. In case you find for the plaintiff, in assessing her damages you are not limited to the simple value of the support and protection of herself, but you may also consider the increase that the earnings of her husband would have made to his wealth and property had he continued to live, and the reasonable expectation which the plaintiff had of pecuniary advantage by ultimately receiving a share of such earnings as one of his heirs, and damages may be given in respect to that expectation being disappointed and the probable pecuniary loss resulting therefrom. That is the general rule. In determining this you will consider the age of these parties, the state of health of the deceased, Mr. Lawson, the kind of a man he was, his ability to work, his ability to save and accumulate property, and the value of the support he was able to and did give her, and that he would be presumed to give her through life. (That would be presumed to have been continued to her hereafter but for his death.) And you will form a judgment as to what damage she has suffered upon that basis. Of course she has lost his support, lost her means of support, or that means of support; has lost any hope that she might have by reason of any accumulations of property on his part. And you will also take into consideration the reasonable expectation that she may have of a long life; you will consider her health as tending to show that; and from all these facts and circumstances you will determine what pecuniary loss she has suffered."

The jury assessed the plaintiff's damages at $3,800. From the judgment entered upon the verdict in favor of the plaintiff the defendant appealed.

For the appellant there were briefs by *S. L. Perrin*, at-

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torney, and *John D. Howe* and *Clapp & Macartney*, of counsel, and oral argument by *Mr. Clapp* and *Mr. Perrin.* They contended, *inter alia*, that even if the relation of carrier and passenger should be held to have existed between the defendant and the plaintiff's intestate, yet the latter was guilty of contributory negligence in voluntarily placing himself in a dangerous position. *Hickey v. B. & L. R. Co.* 14 Allen, 429; *Player v. B., C. R. & N. R. Co.* 12 Am. & Eng. R. Cas. 112, 114; *Downey v. Hendrie*, 46 Mich. 498; *Robertson v. N. Y. & E. R. Co.* 22 Barb. 91; *H. & T. C. R. Co. v. Clemmons*, 55 Tex. 88; *Railroad Co. v. Jones*, 95 U. S. 439; *Little Rock & Ft. S. R. Co. v. Miles*, 13 Am. & Eng. R. Cas. 10; *Camden & A. R. Co. v. Hoosey*, 6 id. 454; *Penn. R. Co. v. Langdon*, 1 id. 87; *Doggett v. Ill. Cent. R. Co.* 34 Iowa, 284; *Dietrich v. B. & H. S. R. Co.* 58 Md. 347; *Peoria & R. I. R. Co. v. Lane*, 83 Ill. 448–451. The conductor of the train had no power to bind the company by consenting that the intestate should ride in the car with the horses. *Eaton v. D., L. & W. R. Co.* 57 N. Y. 382; *Hoar v. M. C. R. Co.* 70 Me. 65; *Elkins v. B. & M. R. Co.* 23 N. H. 275; *Murch v. Concord R. Co.* 29 id. 9, 41, 42; *Jenkins v. C., M. & St. P. R. Co.* 41 Wis. 112, 121; *Graham v. T. G. & B. R. Co.* 23 Up. Can. C. P. 541; *Sherman v. T. G. & B. R. Co.* 34 Up. Can. Q. B. 451; *Union Pac. R. Co. v. Nichols*, 8 Kan. 505; *Lucas v. M. & St. P. R. Co.* 33 Wis. 65, 66. And, in any case, the giving of such consent could not relieve the deceased from the duty of exercising ordinary care.

For the respondent there was a brief by *R. H. Start* and *L. P. Wetherby*, and oral argument by *Mr. Start.*

The following opinion was filed September 22, 1885:

ORTON, J. One W. E. Fay, in the night-time of the 12th of December, 1883, shipped on one of the freight cars of the appellant company, at New Richmond, twelve horses to be carried to Phipps Station, a distance of about 100 miles,

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and employed the deceased to ride in said car to care for said horses on the route. About twenty-five miles from New Richmond, at a station called Clayton, the train in which said car was placed met and collided with another train standing there at the time, and thereby the car in which the horses and the deceased were being carried was crushed in and broken, and the deceased so injured as to cause his death.

It is admitted in the answer that the collision which caused such death resulted from the fault of the servants of the company, and the jury found that the collision which caused it was occasioned by their gross negligence. It is alleged in the complaint that the said Fay entered into a contract with the company that said horses should be so transported for the usual charges, which were paid, and that it was agreed that John J. Lawson, the deceased, the employee of said Fay, should accompany said horses, and ride with them on said car, to look after their interests. It is substantially alleged in the answer that the company was accustomed to make with shippers of live-stock, at that time, written contracts by which the shipper assumed certain risks, and which contained other provisions favorable to the company, one of which was that the persons who were allowed to ride in the car with the stock should so ride at their own risk of personal injury from any cause whatever, and that no passes should be given to such persons, but that they should sign their names on the back of the contract; and no such contract was made in this instance with the said Fay, but that said Fay applied to the station agent at New Richmond for a car in which to ship horses, which car was provided for his use.

It is further alleged in the answer that, after the accident occurred and said Lawson was seriously injured therein, the said Fay and the station agent at New Richmond made out and executed one of said written contracts, and signed the

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name of said Lawson on the back, without authority from the company, and that said Fay was not the owner of all of said stock, and that two other persons rode in said car with the deceased, and that they three conspired to obtain in this way a free passage. There was evidence that said Fay and the agent at New Richmond made the said verbal contract of shipment, which provided that one person should ride in the same car with the horses, to take care of them, and that said Lawson, the deceased, went into said car for such purpose, with the knowledge and consent of the conductor of said train, before the car was placed next to the tender in said train, and that Fay had no knowledge of any such customary written contracts in such cases.

There was no evidence whatever of any conspiracy between said Lawson and the two other persons in said car with him to obtain a clandestine and free ride on said train. Whether said Fay was the owner of all of the twelve horses shipped was quite immaterial to the deceased, rightfully within said car, and was very properly omitted from the special findings and verdict of the jury. There was evidence tending to show that it was customary for the defendant company to carry at least one person free in a carload of horses of such number, to take care of them, and that such person was useful in keeping horses so shipped quiet and from injury when the cars were in motion. This statement of the case is sufficient to make intelligible the positions assumed by the learned counsel of the appellant.

First. That there was no contract between Fay and the station agent that the deceased should accompany the horses in the car, so as to create the relation of carrier and passenger between him and the company. The learned counsel, in assuming that Lawson was a common passenger, or a passenger in the ordinary sense, if he had any right to ride on that train anywhere, and in citing authorities applicable to such a view of his relation to the company, scarcely

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meets the real question here presented. Lawson was, in a sense, a passenger; but he was more than a passenger. He held responsible relations to the stock in his care, and connected with it by the alleged contract of shipment. His place on that train was in the car with the horses, and to care for them, or it was nowhere; and he had no right to be carried on that train in any other place. He was to be carried free and without charge, because he was to be carried in that way. He had no right to be carried in the caboose, or in any other car or place on that train, according to the agreement and understanding of the agent, Gault, and Fay. It was quite immaterial that the deceased was not at the time named as the person to ride in the car with the horses. By the agreement, Fay was authorized to place one person in the car with the horses to take care of them, and the agent did not see fit to have such person named, as he might have done, and Fay carried out the agreement by placing the deceased in the car for such purpose, with the knowledge and assent of the conductor of the train. It is too plain for argument that the deceased was rightfully in the car under the agreement, and was no intruder or trespasser, and the company owed him the duty to carry him there safely by the exercise of reasonable care. The custom of the company in other cases of carrying horses, and with them in the same car some person to take care of them on the route, repels the idea that this case was extraordinary or exceptional. The authorities cited by the learned counsel of the appellant related to common passengers who voluntarily placed themselves where they had no right to be under the contract for their carriage. This is a different case. The deceased occupied the very place where he should have been, and was connected with the live-stock carried so intimately that they could not properly be separated without possible danger to it from the want of his personal care and attention. These are special circumstances attending such

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a case not present in cases of common passenger carriage. In the case cited by counsel for appellant of *Eaton v. D., L. & W. R. Co.* 57 N. Y. 382, it was held that the conductor of a coal train who invited a person to ride thereon free did not bind the company, or create the relation of carrier and passenger between such person and the company. In the opinion in that case, however, cases are cited approvingly of persons riding on gravel trains "under certain circumstances," who might recover for injuries occasioned by collision.

Second. Had the station agent authority to agree with Fay verbally to carry his horses on a freight car, and one person with them to take care of them? It is insisted by appellant's counsel that the station agent had no authority to make such verbal agreement, and had authority only to make such customary written stock contract as set out in the answer. There is very little, if any, substantial difference between the agreement made and the one which it is admitted the agent had authority to make. Both provide for the carrying of one person, with such number of horses on the same car, without charge. The signing of such person's name on the back of the written contract could have no effect except to bind such person to the stipulation that he was to take the "risk of personal injury from any and every cause whatever." Such a stipulation would not have exonerated the company from liability in case of gross negligence. *Black v. Goodrich Transp. Co.* 55 Wis. 322, and cases there cited. The difference between the contract made and the one that the counsel of the appellant now contends ought to have been made is merely formal, and the authority of the agent to make substantially the contract that he did make is virtually conceded. That class of cases relied upon by the appellant's counsel to show that the agent of a carrier company cannot bind the company by contract in violation of his instructions, or outside of the legitimate

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scope of the particular business with which he is intrusted, is inapplicable to this case. The law is well settled that if the agent had authority to make such a contract, and in making it he violates his special instructions as to the mere form of it, of which the shipper has no notice, the company is bound. If the agent has the general authority to make certain contracts, but is restricted by private instructions not known to the other contracting party as to the manner of making them, the principal is bound. This rule is based on the public policy of preventing frauds upon innocent persons, and the encouragement of confidence in dealings with agents. Story on Agency, §§ 73, 126, 133.

Much stress in the argument is laid upon the want of authority in the conductor to permit or allow the deceased to ride in the car with the horses. This question is not of much importance when it is clear that, if the testimony of Fay and Marvin is to be believed,—and the jury had the right to believe it,—the deceased was rightfully in that car by contract and understanding with the agent, and, by other testimony, such a contract was sanctioned by previous custom. There was evidence that the deceased was allowed and permitted by the conductor to so ride, or, at least, that he knew of it and assented to it. It having been customary for a person to so ride in company with horses carried upon said road, the conductor's authority to grant such permission would seem to fall within his general authority in the management and control of the train. *Bass v. C. & N. W. R. Co.* 36 Wis. 463; *Craker v. C. & N. W. R. Co.* 36 Wis. 670; *C., M. & St. P. R. Co. v. Ross*, 112 U. S. 377.

We conclude, therefore, that the deceased was rightfully a passenger upon said train under peculiar circumstances, sanctioned both by the contract and custom of the company. What has already been said supports the ruling of the circuit court in rejecting the evidence offered to prove

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what were the private instructions of the company to its agents as to the form in which such contracts should be made, without showing or offering to show that Fay had knowledge of them.

Third. Did the deceased by his negligence contribute to the injury which caused his death? This was a proper question for the jury to decide, and their verdict should not be disturbed unless the facts were such as to warrant this court in holding, as a matter of law, that the deceased was guilty of a want of ordinary care, and that such negligence *per se* contributed to his injury and death. Wharton on Negligence, § 420 *et seq.; North Penn. R. Co. v. Kirk*, 90 Pa. St. 15; *Karasich v. Hasbrouck*, 28 Wis. 569. Was it so unusual and so clearly dangerous for the deceased to have been carried in that car with the horses, and was his riding therein so much the cause of his injury, that it can be said without hesitation that he was guilty of a want of ordinary care which contributed to his injury? Can it be said that an ordinarily prudent man would not have done so? We think not. When the deceased entered the car he had a right to suppose it would be placed in a safe and proper position in the train. But the company's servants placed it next to the tender, and by reason thereof it was the only car in the train that was demolished by the collision. It was customary for other men to so ride in the car with horses, and the injury to such, occasioned thereby, is not so frequent as to make such a place necessarily or probably dangerous. The testimony was that it was proper and useful for some one to so ride with horses to take care of them and quiet them and keep them from injury. Such service would seem to be a reasonable, as well as common, if not a necessary, employment. The deceased could not have been carried in the caboose, or anywhere else on that train, consistently with his employment. He was in the car with the horses in the discharge of his duty, and, as we have seen, he

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was rightfully there. The jury properly found that he was not guilty of a want of ordinary care in riding in the car in which he received his injuries, which contributed directly to the injury, and that he was not asleep at the time of the accident. They also found that he entered that car for the purpose of caring for the stock during the journey, and that it was usual on that road for men in charge of stock of this kind, and loaded as this was, to ride in the car with such stock. These findings we cannot disturb.

There was no evidence whatever that the deceased entered the car with the horses clandestinely or to steal a ride or to defraud the company, and therefore the authorities applicable to such a case have no force.

The respondent was allowed to show the circumstances of the collision, against the objection of the appellant, in order to show that the servants of the company were guilty of *gross* negligence. According to the brief of the learned counsel of the appellant, "it made no difference in the case, so long as defendant was negligent. If plaintiff showed herself otherwise entitled to recover, she could only be defeated by showing negligence on her husband's part." This being so, proof of gross negligence was immaterial and could do no harm. But we think proof of the accident and its circumstances was proper, and that it justified the finding of gross negligence. The negligence of the company was charged in the complaint and admitted in the answer, but its degree was an open question for the jury.

This disposes of the main questions raised in the brief of appellant's counsel. Then, as special exceptions, which will be briefly noticed: (1) The instruction refused in respect to the deceased having voluntarily placed himself in a dangerous position on the train and thereby contributed to the injury, was refused and qualified so as to embrace the element of common prudence. This was correct, for all

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places about a railroad train are more or less dangerous in case of a collision. (2) What conversation occurred between Marvin and the agent in the presence of Fay in relation to persons riding on the car with the horses, including the deceased, and before he had gone into the car, was a proper question to show the contract, and was a part of the *res gestæ* as far as it related to the right of the deceased to so ride, and as to the others it was immaterial. (3) The rule of prospective damages to the respondent by the loss of her husband, and the evidence to prove it, seem to be fully sanctioned by *Potter v. C. & N. W. R. Co.* 21 Wis. 372, *Castello v. Landwehr*, 28 Wis. 522, and according to the rule elsewhere. *Donaldson v. M. & M. R. Co.* 18 Iowa, 280; *Rowley v. L. & N. W. R. Co.* L. R. 8 Exch. 222; Rorer on Railroads, 1167. (4) The testimony of the witness Reed was properly stricken out, because the deceased was not bound by the statements of others in the car with him after the accident, a conspiracy between them not having been shown. (5) The court properly refused to allow witnesses to give their opinions that the car in which the deceased rode was a dangerous place. This was a question solely for the jury to decide on all the facts. There were some other exceptions, but not important or pressed on the argument.

This case was very ably and fully tried. The rulings of the court and the charge to the jury were considerate and judicious. The findings of the jury are all supported by competent evidence.

By the Court.—The judgment of the circuit court is affirmed.

A motion for a rehearing was denied December 1, 1885.

See note to this case in 24 N. W. Rep. 622.—REP.

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ALDERSON, Appellant, vs. SCHULZE, Respondent.

September 4 — December 1, 1885.

Vessels — Joint owners — Conversion.

One joint owner of a vessel cannot maintain an action against his co-owner for a conversion thereof, except in case of a total destruction, or something equivalent thereto, through the fault of such co-owner. The fact that the co-owner has negligently damaged the vessel, or has run it into debt and created liens upon it beyond its value, is not sufficient.

APPEAL from the Circuit Court for *Columbia* County.

The case is sufficiently stated in the opinion.

The cause was submitted for the appellant on the brief of *Bushnell & Watkins*, and for the respondent on that of *J. H. Rogers*.

The following opinion was filed September 22, 1885:

ORTON, J. The complaint substantially alleges that the parties were joint owners of a steamboat; the appellant owning one third, and the respondent two thirds, thereof. The respondent offered to purchase of the appellant his one-third interest for $700, and the appellant accepted the proposition, and the respondent replied that he would let the appellant know the next morning. The respondent the same night secretly and fraudulently ran the steamboat off and away into the waters of another state, and there so unskilfully, negligently, and improvidently managed it as to sink, greatly injure, and damage it, and incurred great expense about raising and repairing it, and carelessly and negligently ran it in debt, and created liens thereon, amounting in all to a sum greater than its value, and made the appellant's interest therein wholly valueless to him, and deprived him of his interest therein, to his damage of $700. On the trial the respondent objected to any evidence, on the ground that the complaint failed to state a cause of

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action, and the objection was sustained, and judgment was rendered dismissing the complaint, and for costs.

The learned counsel of the appellant contends in his brief that the complaint states three causes of action: contract, tort, and in equity. If that were so, the complaint might be bad for duplicity. *Supervisors v. Decker*, 30 Wis. 624. But the complaint certainly does not state three causes of action, or even attempt so to do. It states no completed sale of the appellant's interest, or contract of sale, or breach of contract, and it asks no accounting in equity.

The first grievance complained of is the running the boat off. This the respondent had the right to do if he had purchased the appellant's interest. All the statements of the complaint, down to the allegation that the respondent had run the boat in debt and created liens on it of greater amount than its value, are merely preliminary and introductory thereto. If any possible cause of action is stated in the complaint, it is in the nature of trover for the respondent's having negligently caused a total loss of the appellant's interest in the boat while under his exclusive management and control, which would be equivalent to the destruction of the boat itself. It is only when the complaint against a tenant in common of a vessel or steamboat who is charged with negligence while in its management, is to such effect that it states a cause of action. In *Barnardiston v. Chapman*, 4 East, 121, the plaintiff was tenant in common of a moiety of a ship, and the defendants his co-tenants of the other moiety. The defendants took the vessel by force from the possession of the plaintiff, and sent it to Antigua, where it was lost. The verdict for the plaintiff was sustained, on the ground that the jury found that such loss would amount to a destruction of the ship. In *Lowthorp v. Smith*, 1 Hayw. (N. C.), 255, it is held that if a joint owner of a vessel, after getting sole possession, shall, without consent or against the will of the other owner, send the vessel

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to sea, and she is lost, the jury may consider such loss as a destruction of the vessel. If a tenant in common, though rightfully in possession, yet by negligence causes the destruction of the property, an action will lie against him in favor of his co-tenant. *Chesley v. Thompson*, 3 N. H. 9; *Herrin v. Eaton*, 13 Me. 193; *Maddox v. Goddard*, 15 Me. 218; *Anders v. Meredith*, 4 Dev. & B. 199. "If a tenant of chattels so appropriates them to his own use as to render any future enjoyment of them by his co-tenant impossible, the latter may maintain an action of tort in the nature of trover against him." *Needham v. Hill*, 127 Mass. 133. See Desty, Shipp. & Adm. 98; Pars. Shipp. & Adm. 94, and note.

These authorities lay down the most liberal rule for recovery in such cases, and they hold that something must be done with the joint property by a co-tenant equivalent to its total destruction. The mere dispossession of one co-tenant is not sufficient, or damage to the joint property. There must be such an entire loss of the joint property to one tenant, by the negligence or fraudulent conduct of his co-tenant, as to amount to its destruction. In some cases when the property is divisible a sale of it by one tenant in common may give a right of action to his co-tenant in trover for the conversion of his interest or share. *Earll v. Stumpf*, 56 Wis. 50; *Dahl v. Fuller*, 50 Wis. 501; Cooley on Torts, 455. Tested by the most liberal rule, this complaint fails to state the essential fact of the loss of the steamboat to the appellant by the negligent conduct of the respondent. The boat was run in debt and liens were created upon it to an amount exceeding its value by the respondent; but he is liable to pay such debts, and pay and discharge such liens, and the presumption is that he will do so. But, whether he will or not, the boat has not been sold or disturbed by its debts and liens so far, and may never be. No loss of the boat has yet occurred to the appellant.

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There is considerable conflict of authority as to when such an action will lie against a tenant in common by his co-tenant, but there is no authority to sustain such an action in the case made by this complaint.

By the Court.— The judgment of the circuit court is affirmed.

A motion for a rehearing was denied December 1, 1885.

FITZGERALD, Administratrix, etc., Respondent, vs. THE CONNECTICUT FIRE INSURANCE COMPANY, Appellant.

October 19 — December 1, 1885.

Insurance against fire: "Vacant or unoccupied."

A dwelling-house, granary, and horse-barn were insured by a policy which stated that they were occupied by a tenant, and provided that if they became vacant or unoccupied and remained so without consent, etc., the policy should be void. The tenant left and the premises were for some time vacant. Afterwards the assured told the agent of the company that he was not going to leave a tenant in the house any more, and explained that he couldn't work the farm and keep the tenant there; that he wanted his men to go there and do the farm work; that his men had to go from place to place, and that while they were there they would live in the house. Thereupon the agent indorsed upon the policy: "It is understood that the buildings insured hereunder are now occupied for dwelling and farm purposes." The assured lived upon another farm about two miles distant, but carried on the farm upon which the insured buildings were situated. While his men were at work upon the latter farm they cooked, ate, and slept in the dwelling-house, in which there was some furniture; but when no work was being done on that farm no one stayed in the house, though frequently some one would go through the house to see if things were right. *Held*, that the dwelling-house was not "occupied" within the meaning of the indorsement upon the policy. [TAYLOR and ORTON, JJ., dissent, being of the opinion that the indorsement, construed in the light of the explanation made to the agent, did not contemplate a continuous occupancy.]

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APPEAL from the Circuit Court for *Winnebago* County.

Action upon a policy of insurance against fire covering a dwelling-house and other farm buildings. The dwelling-house was destroyed by fire November 14, 1883. The evidence given upon the trial and the special findings of the jury are sufficiently stated in the opinion. The defendant appealed from a judgment in favor of the plaintiff.

J. W. Lusk, for the appellant.

For the respondent the cause was submitted on the brief of *James Freeman* and *Gabe Bouck*.

COLE, C. J. This is an action upon a policy of insurance. The policy was issued November 22, 1880, on a dwelling-house, frame granary, and horse-barn — three separate buildings — for the term of three years. The policy stated that the premises were occupied by a tenant. The tenant remained on the premises for a year or more and then left. It is practically conceded that the buildings were vacant and unoccupied for some time thereafter. The policy contained the condition that if the premises became vacant or unoccupied, and so remained for more than ten days, without notice to and consent of the company in writing, it should be void. On the 20th of June, 1883, the assured went to the agent of the company and said this, to use his own words: "I came in to Mr. Lawson, and told him that I was not going to leave a tenant in the house any more; that I couldn't work the farm and keep the tenant there; that I had to have my own men there while I was putting in the crops and taking it out and cutting the hay. I kept my cattle there all the time, and there was no use of my keeping it insured unless I could keep it insured in that way. He said he would sooner have it that way than have a tenant in, so he indorsed on the policy in that way. He put that indorsement on there, and said that would make it all right. I explained to him at that time that I wanted

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my men to go there and put in the crops and take it out, and also cut the hay and do the plowing, the same as we had to do on any farm. I told him my men had to go from one place to the other, and while we were there we wanted to live in that house, and that was the way it was going to be occupied,—that way and no other. That is the precise way I stated." The agent then indorsed on the policy this writing: "June 20, 1883. It is understood that the buildings insured hereunder are now occupied for dwelling and farm purposes. H. L. Lawson & Bro., Agts." The assured lived about two miles distant on another farm, and carried on the farm upon which the insured buildings were situated during the summer and fall of 1883, his men going back and forth, sometimes sleeping and eating in the insured dwelling-house, and there was some little household furniture therein. As to the kind or extent of occupancy of the dwelling, the assured further said: "All the occupancy there was, was while these men were there,—while they were there to work. . . . When there was not anything being done on that farm there would be no men staying in the house at all. If they had no work to do there, there was nobody staying there at all. When there was work to do the workmen cooked and slept there, the same as the house where I live." This was the character of the occupancy, as appears from the plaintiff's own case. When there was work to be done upon that farm the men cooked, ate, and slept in the house. Often, when men were not at work there, some member of the family would go to the farm or to the house, go through it, and see if things were right. But it is not claimed, nor could it be on the testimony, that some person usually lived at the house, or stayed upon the premises and slept there. For periods of more than ten days there was no one in the house nights, and it was absolutely vacant and unoccupied as a dwelling-house.

A number of questions were submitted to the jury, to

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which answers were given. The fourth question was this: "Was the dwelling-house insured unoccupied and vacant at any time after the indorsement of June 20, 1883, and did it still remain vacant and unoccupied for above ten days at any one time?" To this question the jury answered in the negative, in the teeth of an instruction given that the term "occupied," within the meaning of the policy, means that the house must be habitually occupied; that is, somebody must have lived there and slept there habitually,— not every night, but usually and ordinarily. The ninth question was this: "After the 20th of June, 1883, was the said building occupied for dwelling and farm purposes?" This the jury answered in the affirmative. After a careful examination of the testimony it seems to me that both these findings are wholly unsupported by the proofs in the case. Certainly, the word "occupancy," as used in the policy, is not to be understood in any technical sense. It is not that occupancy or possession which follows the legal title, and which the assured might be said to have by reason of owning and cultivating the farm. It means something more than this. As applied to the dwelling, it is to be understood in the popular sense as defined in the following cases: "For a dwelling-house to be in a state of occupation there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage." FOLGER, C. J., *Herrman v. Adriatic F. Ins. Co.* 85 N. Y. 169. "A dwelling-house and barn are unoccupied, within the meaning of an insurance policy which provides that buildings unoccupied shall not be covered by the policy, where the house is only used by the insured and his servants for the purpose of taking their meals there when engaged in carrying on a contiguous farm, and the barn is only used for the purpose of storing hay and farming tools." *Ashworth v. Builders' M. F. Ins. Co.* 112 Mass. 422. To the

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same effect are *Keith v. Quincy M. F. Ins. Co.* 10 Allen, 228; *American Ins. Co. v. Padfield*, 78 Ill. 167. It is impossible to affirm that there was any actual use or occupation of the dwelling-house after the 20th of June, 1883, in this manner.

The fifth and sixth questions are as follows: "Did the plaintiff's intestate state to the agent of the defendant at the time the indorsement of June 20, 1883, was made that it (the dwelling-house in question) was going to be used in the manner in which it was afterwards used?" (6) "Did the insurance agent assent to the building being used by plaintiff's intestate as the testimony shows it was used?" Both of these questions were answered in the affirmative. We have already given the testimony of the assured of "the precise way" he explained to the agent how he proposed to use and occupy the building and farm; and we think no one would suppose from what was then said that the dwelling-house was only to be occupied when the men were at work on the farm, and at all other times it was to be vacant and unoccupied, with no one living in it by day nor sleeping in it by night. On the contrary, we think the agent might well suppose that some one (not a tenant, but some member of the family of the assured) was going to live in the house, and would usually be in it nights to look after it.

In answer to the tenth question the jury found that the building was used in accordance with the arrangement made between the assured and the agent on the 20th of June. We have shown from the testimony of the assured himself just what that understanding or arrangement was. No comment is necessary to point out the entire absence of proof to support the finding of a different arrangement.

The eleventh question was: "Does the indorsement of June 20, 1883, state the agreement and understanding between the agent and Mr. Fitzgerald as to how the insured building was to be thereafter used and occupied?" The

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answer was as follows: "Yes; we mean by 'yes' on question eleven that the premises were occupied as understood by the assured and the agent, Lawson, at the time of the indorsement on the 20th of June, 1883." This answer is clearly an evasive one. The question admitted of a direct and unqualified answer, and the defendant was entitled to it. *Davis v. Farmington*, 42 Wis. 426. The learned circuit judge had stated, on submitting this question, that it had been claimed on the part of the plaintiff that the writing on the policy of June 20th did not express the whole agreement that was at the time made, but that there was some further understanding between the parties not expressed in the writing itself; and the circuit judge directed the jury that they were not to answer this question in the negative, unless satisfied beyond a reasonable doubt, by testimony that was clear and convincing, that the writing did not contain the whole agreement which was made at the time. Presumably the writing contained the agreement or understanding of the parties. True, it is not very explicit, and seems to refer merely to the state of things existing when it was made. It reads: "It is understood that the buildings insured hereunder *are now occupied for dwelling* and farm purposes." The writing seems to relate to present not future occupancy. But, if construed in the light of the testimony of the assured, we should infer from it that he had some doubt whether the policy did not require an occupancy by a tenant; perhaps he feared that it had already become forfeited by reason of non-occupancy. It does not appear that the assured communicated to the agent the fact that the buildings had been vacant and unoccupied for a year or more. The agent says he did not communicate to him that fact. But we are now considering the findings with reference to the plaintiff's case, seeking to ascertain what evidence there is to sustain them. If the agent made a mistake in reducing the agreement to writing, this doubt-

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less might be shown by parol testimony. But we find no satisfactory evidence that any mistake was made. For, as we have said, the obvious legitimate inference from the testimony of the assured is that the buildings were not to be occupied by a tenant longer, but that his men would occupy them while at work on the farm for farm purposes. But that there was to be an occupancy by some one seems to be fairly implied, as well from the testimony of the assured as the writing itself so far as it bears upon the question.

The motion made by the defendant to set aside the findings of the jury, because contrary to or unsupported by the testimony, should have been granted.

TAYLOR, J. The only material question in the determination of this appeal arises upon the construction of the indorsement made upon the policy of insurance by the agent of the company, as shown upon the trial. The property insured is a dwelling-house, granary, and horse-barn. The policy is for three years, and bears date November 22, 1880. When the policy was taken it was stipulated therein that the premises were occupied by a tenant, and there was a condition in the policy that if the premises became vacant or unoccupied, and so remained for more than ten days without notice to and consent of the company obtained in writing, it should be void. The proofs on the trial showed that previous to the 20th day of June, 1883, the tenant had left the premises, and they had been vacant and unoccupied for more than ten days without notice to or assent of the company. On the day last mentioned the insured came to the agent of the company with his policy, and, as he testifies, made the statement quoted in the opinion of the court filed in this case, and thereupon the agent made the following indorsement on the policy: "June 20, 1883. It is understood that the buildings insured hereunder are now occupied for dwelling and farm purposes. H. L. LAWSON & BRO., Agts."

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As the jury were to judge as to the truth of the statement alleged to have been made by the assured to the agent of the company at the time this indorsement was made, and they having found that such statement was in fact made as testified to by the assured, it seems to me the indorsement must be construed in the light of such statement, and is intended to so change the original policy as to permit the assured thereafter to occupy the property in the way he clearly indicated it would be thereafter occupied.

If we consider this indorsement made to carry out the wishes and purposes of the insured as to the manner of occupying the premises insured thereafter, it seems to us quite clear that it should not be so construed as to require an actual and continued occupation of the dwelling-house thereafter, either by the insured or by some one in his employ. The statement made clearly negatived the idea that the insured would occupy the insured dwelling in person, and the proofs show more clearly that there could not have been any such intention, or that the agent could have so understood the assured; as it appears he had another and much larger farm, and a much more convenient and comfortable house, where he was then living with his family. Is it, then, fairly to be inferred that the insured was to keep the same constantly occupied by an employee or some member of his family? If there was any understanding that it should be constantly occupied thereafter, it must have been that an employee, or some member of his family, should so occupy it, because the agent was informed that it would not be thereafter occupied by a tenant of the insured. To me it is sufficiently plain that the fair inference to be drawn from the statement made by the insured was that thereafter the buildings would not be constantly occupied by any one, but they would be so occupied only when he and his men were there on the farm at work putting in the crops or harvesting the same. He says: "I explained to him that I wanted my men to go there and put in the crops

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and take it out, and also cut the hay and do the plowing, the same as we had to do on any farm. I told him [the agent] my men had to go *from one place to another*, and *while we were there we wanted to live in that house*, and that was the way it was going to be occupied; that way, and no other." It cannot, I think, be fairly inferred from this statement that the insured intended to or did convey to the agent the idea that some one would be constantly in the actual occupation of the insured buildings within the ordinary meaning of those words; and that the words of the indorsement may well be construed in the light of this statement to mean just such an occupancy as the assured stated they were to have, and that such occupancy would not be a continuous one, but would conform to the necessities and convenience of the insured in carrying on and working the farm on which they were situated.

While the findings of the jury are undoubtedly subject to the criticism made in the opinion of the majority of the court, still, if the indorsement be construed as I think it must be in view of the evidence, the inconsistencies of the findings are not fatal to the plaintiff's right of recovery, and ought not to reverse the judgment; or if the judgment should be reversed on account of the inconsistent and unsupported findings of fact by the jury, then it should be reversed for that reason alone, and not because, upon the whole evidence in the case, the plaintiff is not entitled to recover.

Orton, J. I most respectfully concur in this dissenting opinion as expressing my views of the case.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

See note to this case in 25 N. W. Rep. 789.—Rep.

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Osgood, Plaintiff in error, vs. The State, Defendant in error.

October 20 — December 11, 1885.

Criminal Law and Practice. *(1) Rape: Evidence: Instructions to jury. (2) Jury: Drawing and summoning: Presumption. (3) Reading information to jury.*

1. The evidence in this case is *held* to sustain a conviction of the crime of rape; and the instructions to the jury defining the crime and as to the consideration of the evidence by the jury, are *held* to have been correct.
2. In the absence of any showing to the contrary it will be presumed that jurors were regularly drawn and summoned.
3. It is not necessary to read the information to the jury when the defendant has been properly arraigned, and has pleaded to the information, and the jury have been fully instructed as to the nature of the crime with which he is charged.

ERROR to the Circuit Court for *Polk* County.

The information contained two counts, the first charging the defendant with the crime of rape, and the second charging an assault with intent to commit that crime, upon his daughter, a girl about thirteen years of age. The defendant was found guilty under the first count. Other facts are stated in the opinion.

The cause was submitted for the plaintiff in error on the brief of *Charles D. Smith*, and for the defendant in error on that of the *Attorney General.*

Cole, C. J. Though that ground is not assigned in the motion for a new trial, that the evidence is insufficient to sustain the conviction, yet this point is strongly relied on in the argument of counsel for the defendant below. But if the point had been formally made and considered by the trial court, it could not have prevailed in view of the evidence set forth in the bill of exceptions. The direct and positive testimony of the complaining witness, if believed

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by the jury, is amply sufficient to support the verdict. The jury must have believed her testimony to have found as they did. And whatever may be said against the credibility of her statements as to the time and place the crime charged in the information was committed, we cannot say that these statements are so improbable as to be unworthy of credit. It is true, the crime is a very grave one, especially considering the relation of the parties and the age of the complaining witness. But the jury must have given credit to her statements, and considered them sufficient to establish the truth of the charge; so that the objection that the verdict is unsupported by evidence would fail, even if properly raised upon the record.

The first ground assigned for a new trial is that the jury was not regularly drawn and summoned. We are not clear as to what irregularity is relied on in support of this objection, but infer that counsel suppose the trial was at a special term ordered by the circuit judge pursuant to sec. 2426, R. S. But this was not the case. The defendant was tried at the regular term of the circuit court for Polk county, in December, 1882 (see ch. 90, Laws of 1882), and we must presume, in the absence of all showing to the contrary, that the jurors were regularly drawn and summoned for that term. Certainly, if any ground for a challenge to the panel existed, it should be made to appear affirmatively upon the record. We cannot presume that the jurors were irregularly summoned, or that they were not qualified jurors.

The next ground relied on in the motion for a new trial is error in the instructions of the court. Here we are left in the dark as to what particular parts of the charge are deemed erroneous or prejudicial to the defendant. True, there are three portions of the charge included in brackets in red ink which may have been excepted to on the trial, though there is nothing to show that such was the fact. But these parts of the charge are so obviously correct that

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we shall not comment on or even quote them. The charge is quite lengthy, and is mainly devoted to an exposition of the law of rape, with some remarks upon the testimony. The learned circuit judge defined the offense of rape, and stated what were the essential elements of the crime. He said, in substance, that to constitute rape the use of force was essential in the commission of the crime, and that the act of connection must be forcibly committed without the consent and against the will of the female. He then dwelt upon what amounted to a sufficient carnal knowledge of the female to render the crime complete, saying there must be a penetration of the female organ by the organ of the male.

It seems to us that there is nothing in this charge of which the defendant can complain. There is no foundation for the suggestion that the trial judge exhibited any bias against the defendant in the charge, or that he encroached upon the province of the jury in his remarks upon the testimony. All questions of fact were fairly submitted under a charge which was very well guarded to protect all the rights of the defendant. The jury were, in effect, told that they must carefully scrutinize all the testimony; take into consideration the relation of the parties; the age of the prosecuting witness; all the circumstances as detailed by her attending the commission of the offense; the denial of her statements by the defendant; and, after weighing all the evidence in the case, they must be satisfied beyond a reasonable doubt of the guilt of the defendant, otherwise he was entitled to an acquittal at their hands. We do not think that the jury could have been in any way misled by the charge.

The information contains two counts: one for the crime of rape; the other for an assault with intent to commit that crime. The jury, however, were directed to state in their verdict under which count they convicted, if they should find the defendant guilty of either offense charged. The

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defendant was convicted under the first count. The last and only remaining ground for a new trial is that the contents of the information were not read to the jury before they returned with their verdict. This was unnecessary. The record shows that the defendant was properly arraigned, and pleaded to the information; and the jury were fully instructed as to the nature of the crime with which he was charged.

After an examination we find nothing in the record which should reverse the judgment. It is therefore affirmed.

By the Court.—Judgment affirmed.

PHILLIPS, Administrator, etc., Respondent, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

November 3—December 1, 1885.

(1) Estates of decedents: Appointment of administrator to bring action for causing death. (2-4) Railroads: Negligence: Collision: Signals: Rules construed: Court and jury: Instructions. (5) Who are fellow-servants: Employees of one company running trains on track of another.

1. In an action by an administrator to recover damages for the death of his intestate the complaint alleged that the deceased left no property. The answer denied the appointment of the plaintiff as administrator. *Held*, that the letters of administration issued to the plaintiff were admissible in evidence, notwithstanding an objection on the ground that, there being no estate to administer, there was no authority to issue the letters.
2. Where the uncontroverted evidence showed that a railroad station at which a collision occurred was only a signal station; that there was no depot or depot grounds, but only a side-track, and no person stationed there, it was not error in an instruction to the jury, after stating those facts, to add that "the only person who could give signals at that point would be men connected with trains stopping at that point."

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3. Between Milwaukee and Schwartzburg, the trains of the W. C. railroad were run over the defendant's track under the rules and running orders prescribed by the defendant. A W. C. freight train left Milwaukee under special orders from defendant's train-dispatcher to "run wild to Schwartzburg, keeping clear of regular trains." There was a dense fog, and at a signal station between those points said train ran into a train of the defendant which had left Milwaukee before it and was then more than an hour behind time, and which was backing, when the collision occurred. A brakeman of the W. C. train was killed. In an action to recover damages for such killing, *held:*

(1) An instruction to the jury that the persons in charge of the W. C. train were bound to observe the rules of the defendant so far as they did not conflict with the special orders which they had received, was not misleading to the prejudice of the defendant.

(2) A train which if on time would not have arrived at Schwartzburg until after the W. C. train had left the last telegraph station before that place, was a "regular" train, for which a lookout was to be kept.

(3) A rule that trains are always to "approach a station on the supposition that a train is to be met there and is standing upon the main track," contemplates only the *meeting* of trains.

(4) The questions of negligence in the management of the W. C. train, and of negligence on the part of those in charge of the defendant's train in failing to give any signals or warning to trains which might be following, were properly submitted to the jury.

4. A rule required that "conductors and brakemen of freight trains approaching stations must be out on their trains at least one mile from every station." As the W. C. train approached the station at which the collision occurred the conductor was riding upon the engine and the brakeman who was killed was standing in the gangway between the tank and the engine. It was so foggy that the engineer could not see more than fifteen feet ahead of the engine. *Held:*

(1) The negligence, if any, of the conductor and brakeman in remaining in those places, was remote and did not contribute to the accident.

(2) Although had the brakeman been at his post on top of the cars he might not have been injured, yet his improper position was not the proximate cause of the injury.

5. Neither the W. C. company nor the defendant had any control over the employees of the other, except that upon the track in question the W. C. train-men were required to obey the rules prescribed

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by the defendant's general manager and the special orders given by the defendant's train-dispatcher. *Held*, that plaintiff's intestate was not a fellow-servant of the men in charge of the defendant's train whose negligence caused the accident.

APPEAL from the Circuit Court for *Fond du Lac* County.

The case is thus stated by Mr. Justice CASSODAY:

"By agreement the trains of the Wisconsin Central Railroad Company had the privilege of running upon and over the defendant's line of road between Milwaukee and Schwartzburg, a distance of about nine miles. Such trains were to run "on such times, running orders, and regulations as might from time to time be fixed and prescribed" by the general manager of the defendant, and be under the exclusive jurisdiction and control of the defendant. West Milwaukee station is on that line, and two miles west from Milwaukee depot. Summit Side Track is on that line, and two miles west of that, or four miles out from Milwaukee depot; and Schwartzburg is about five miles west from Summit Side Track. Going west from West Milwaukee to Summit Side Track there is a heavy up-grade. On the morning of February 28, 1882, the defendant's regular freight train No. 11 started from Milwaukee depot on the regular time, 5:45 A. M., and reached West Milwaukee on the regular time at 6 A. M.; but in going from there to Summit Side Track it was obliged to cut the train in two and mount the grade by taking a part of the train at a time. The defendant's regular mixed train No. 3 started from Milwaukee depot on the regular time, 6:45 A. M., and reached West Milwaukee on the regular time at 7 A. M.; but on approaching No. 11 on the track it was signaled by the latter, and its engine assisted that train up the grade and then took its own train up to Summit Side Track, so that before and at 7:32 A. M. No. 11 was on the main track at Summit Side Track; and at the same time No. 3 was on the side track at Summit Side Track. On that same morning the conductor

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and engineer of the Wisconsin Central freight train in question received orders from the defendant's train dispatcher to leave Milwaukee with that freight train at or after 7 A. M., "and run wild from Milwaukee to Schwartzburg, keeping clear of regular trains." In obedience to such orders the Central train in question left Milwaukee at 7 A. M. and reached West Milwaukee at 7:15 A. M., when it stopped to take orders and registered, and then started on towards Summit Side Track at 7:16 A. M., and reached the latter place at 7:32 A. M. The morning was cold, and so foggy that the engineer of that train could see no more than ten or fifteen feet ahead of his engine. At that point the Central train ran into the rear end of No. 11 there upon the main track. When the collision occurred Richard McBride, the head brakeman on the Central train, was standing in the gangway between the tender and engine, and was killed by the collision. None of the Central cars were thrown from the track.

"The plaintiff brings this action to recover damages by reason of the intestate's death. On the trial there was a verdict for the plaintiff, and from the judgment entered thereon the defendant appeals."

For the appellant there was a brief by *John W. Cary*, attorney, and *Burton Hanson*, of counsel, and oral argument by *Mr. Hanson*. They contended, *inter alia*, that the trainmen of the Wisconsin Central train were negligent in running into Summit Side Track station in the manner they did, and that the accident was wholly chargeable to such negligence. *McDade v. Georgia R. & B. Co.* 58 Ga. 73; *S. C.* 18 Am. Ry Rep. 183; *Doggett v. Ill. Cent. R. Co.* 34 Iowa, 284; *Sprong v. Boston & Alb. R. Co.* 60 Barb. 30. The negligence of the conductor and engineer of that train was the negligence of all parties on the train, including plaintiff's intestate. *Prideaux v. Mineral Point*, 43 Wis. 513; *Otis v. Janesville*, 47 id. 422; *Houfe v. Fulton*, 29 id. 296; *L. S. &*

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M. S. R. Co. v. Miller, 25 Mich. 274; *Payne v. C., R. I. & P. R. Co.* 39 Iowa, 523. The accident was a risk incident to the employment of the deceased. While running over the defendant's track on the Wisconsin Central trains he assumed the risk of being injured by the carelessness of the men in charge of the defendant's trains. They were all fellow-servants engaged in a common employment and under the same general control while passing over the track between Milwaukee and Schwartzburg. Wood on M. & S. sec. 435; *Mills v. O., A. & M. R. Co.* 2 MacArthur, 314; *I. C. R. Co. v. Cox*, 21 Ill. 20; *Clark v. C., B. & Q. R. Co.* 92 id. 43; *Johnson v. Boston*, 118 Mass. 114; *Wiggett v. Fox*, 11 Exch. 832; *Rourke v. White Moss C. Co.* L. R. 1 C. P. Div. 556; *S. C.* 18 Eng. (Moak), 191. The court erred in admitting the pretended letters of administration issued to the respondent. The complaint alleges that the plaintiff's intestate died without leaving any property, and the widow testified to the same fact. In such a case the court had no authority to issue letters of administration. R. S. sec. 3806.

Gabe Bouck, for the respondent.

CASSODAY, J. The action could only be brought by and in the name of the personal representative of the deceased. Sec. 4256, R. S. The answer denied the appointment of the plaintiff as administrator. There was no error in admitting in evidence the letters of administration issued to the plaintiff.

There was no error in allowing the plaintiff to prove the exact condition of things at Summit Side Track; that there was no depot, no depot grounds, nor any person stationed there; that there was only the main track, side track, and switches at each end. The time-table in evidence showed it to be a "signal station." These facts were undisputed, and the error assigned because the court repeated them to the jury is without foundation. The addition of the re-

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mark that "the only person who could give signals at that point would be men connected with trains stopping at that point" was an inevitable conclusion from the uncontroverted facts, and hence was no error. Upon the evidence stated, who else would be there to give such signals? In the absence of all trains at Summit Side Track, there would necessarily be an absence of all signals at that place, unless given by persons not connected with either company. This being so, the absence of any signal at that place, especially on a morning like the one in question, would naturally induce the inference that no train was there. There would be no propriety in calling it a "signal station," if every train was required to stop there in the absence of any signal.

The question whether the conductor, engineer, or servants on board the Wisconsin Central train were negligent in running or managing that train, under the facts and circumstances disclosed in the evidence, was submitted to the jury, with direction to find for the defendant if any of them were negligent. The verdict for the plaintiff was a finding that none of them were negligent.

Exception is taken because the court instructed the jury in effect that "while the servants in charge of the Central train . . . were running at that time under special orders, yet the servants on that train were bound to observe the rules of the defendant . . . so far as they did not conflict with the special orders which they had" received. The "special orders" were to "run wild from Milwaukee to Schwartzburg, keeping clear of *regular* trains." Of course, a wild train under special orders was bound to obey such orders. The very object of giving *special* orders may be to relieve those in charge of a particular train from being governed by one or more of the general rules. The "movement of trains by telegraph" necessitates special orders by telegraph. The eight printed rules under that head all relate to such special orders. Thus, "When a train

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has orders to run regardless of a *specified* train, it gives the train under such orders no right over *another* train." So, "No train shall assume the rights or take the time of any other train without special orders." That is to say, as the court in this case in effect did say, a train under special orders is bound to observe the general rules, except in so far as they conflict with such special orders. The instruction referred to was not misleading. For the same reasons, it was not error to instruct the jury, in effect, that "it was the duty of the engineer and conductor" of the Central train "to be on the lookout for signals" on approaching Summit Side Track, "so that they might avoid a collision at that place if there was a train upon the track." For the same reasons, it was not error to instruct the jury, in effect, that "it was the duty of the men in the charge of the . . . Central train to observe the rules of the defendant, . . . and . . . to look out for *regular* trains which might be upon the road." Such, in effect, were the special orders in question.

But what is to be deemed a "regular train"? Freight train No. 11 was due at Schwartzburg half an hour before the Central train left Milwaukee, and three quarters of an hour before it left West Milwaukee; and yet no reference was made in the special orders to the fact of that train being behind time; but, on the contrary, the orders were to run *wild* to Schwartzburg, which indicated that the road was clear to that point so far as No. 11 was concerned. Was that to be regarded as a regular train after it ceased to run on regular time? When struck, it was an hour and seventeen minutes behind time. Should not the men in charge of the Central train have been notified of the fact that No. 11 was behind time? True, mixed train No. 3 was not due at Schwartzburg until four minutes after the Central train had left West Milwaukee, but had it been on time it would then have been some three miles west of Summit

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Side Track. Its time was faster than No. 11, and faster than the speed of the Central train. But still it was liable to get behind time, and there had been no opportunity for notifying the men in charge of the Central train that it was behind time at Schwartzburg, and so they were bound to be on the lookout for signals from that train, as the jury were instructed by the court.

The engineer of the Central train testified, in effect, that he went from West Milwaukee up to the Summit, using the caution of whistling around every curve, as well as crossing; that in coming to the Summit he had all but shut off his engine, and as the fog was so dense he had his head out of the window, and kept his eye peeled for anything that might happen; that he saw a dark object, as it was, in the fog, and sang out, "Jump, for Christ's sake!" but almost as soon as he got the words out the collision occurred; that when he saw the dark spot, he reversed the engine, plugged her, and squealed for brakes, and that there was no possible way of stopping the train sooner than he did; that there was no signal, warning, guard, or anything; that when he first saw the end of the train ahead of him, he had passed the first switch about 100 or 120 feet, and No. 11 was backing towards him. Whether they were bound to exercise still greater care, or perform a still more stringent duty, is another question.

It is urged that the undisputed evidence shows that the men in charge of the Central train violated the printed rules in running into Summit Side Track at the rate of speed they did. The rules relied upon by the defendant provided in effect that "trains will start from Milwaukee . . . on their card time." Under this, the men in charge of the Central train were bound to assume that No. 11 and No. 3 would leave Milwaukee "on their card time." Again, "Care must be used in coming into all stations. Always approach a station on the supposition that a train *is to be met there* and

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is standing upon the main track." But the special orders were to *run wild* except as to regular trains, and no such train was due at that place at that time. So the last clause of the rule quoted is in conflict with the special orders given, and hence were to be disregarded by the men to whom they were given. Besides, that clause of the rule only contemplated the *meeting* of trains at stations, that is, trains approaching each other from opposite directions, and not to trains following each other in the same direction. Those seem to be provided for by other rules. The rules provided that "freight trains will not exceed ten miles an hour passing stations." This indicates the speed at which a freight train is permitted to pass a station at which it is not required to stop. Evidently the Central train did not exceed the speed indicated. At least there was evidence authorizing the jury to find that it did not. It was sixteen minutes running from West Milwaukee to Summit Side Track, a distance of only two miles. This indicates that the average of the run was a mile in eight minutes, or seven and a half miles per hour.

The rules further provided that "conductors and brakemen of freight trains approaching stations must be out on their trains at least one mile from every station." It is claimed that this applied to Summit Side Track. It appears that after the train left West Milwaukee, the conductor went upon the engine and sat in the fireman's seat, and remained there until the collision, and that the head brakeman rode for a short distance on the tender, and then went into the gangway between the tank and the engine, and stood there until the collision. There was but one other brakeman on the train, and there is no evidence as to where he was. These are claimed to be violations of the rule, and hence negligence in the management of the train. On such a foggy morning it would seem that the conductor took the best position possible for observation and giving warning.

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But, assuming that Summit Side Track was one of the stations referred to in the rule, and that the conductor and head brakeman were not in the places required by the rule, yet, as it was so foggy at the time that the engineer could not see more than fifteen feet ahead of the engine, it is very evident that neither the location of the conductor nor head brakeman in any way tended to bring about the collision, or that their location elsewhere could have prevented it. Their location elsewhere would have been of no service in giving warning of undiscoverable danger, nor to put on brakes in pursuance of a signal which could not be given in time to escape the collision. These things being so, such improper location, if negligence at all, was exceedingly remote, and in no way contributed to the collision. *Pease v. C. & N. W. R. Co.* 61 Wis. 166, 167.

Under all the facts and circumstances of the case, we think there was no error in submitting to the jury the question whether there was any negligence in the management of the Central train.

It is claimed that the fact that the deceased was in such gangway at the time of the collision contributed to his injury, and hence that the plaintiff cannot recover. The argument is that had he been at his post on the top of the freight cars, he would not have been injured, as none of them were thrown from the track. But he is not to be held responsible for the non-expectation of a collision, much less for just such a collision and just such consequences as followed. His negligence, if it can be called negligence, was a mere condition of the injury. As well might it be said that had he ridden in the caboose or on the engine, contrary to the rule, he would not have been injured. The collision was the proximate cause of the injury. His being in the gangway was not the juridical cause of the injury. It may have been a remote causation,— sometimes called remote negligence,— but it is

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too remote to be of any significance here, and hence the plaintiff is not to be thereby precluded from recovery. We cannot say there was any error in submitting to the jury the question of the deceased's contributory negligence.

Is there any evidence tending to show negligence on the part of the defendant? As already observed, there was a failure to notify the men in charge of the Central train that No. 11 was behind time at Schwartzburg, notwithstanding there was three quarters of an hour in which to give such notice before the Central train left West Milwaukee. So it has been observed that at the time of the collision No. 11 was an hour and seventeen minutes behind time, and was backing on the main track towards the Central train; that No. 3 was twenty-five minutes behind time; and that there was no signal, warning, guard, nor anything to inform the men in charge of the Central train that the other trains were behind time, nor of their approaching danger. Was there any duty on the part of the men in charge of No. 11 or No. 3 to give such signals or warnings? One of the defendant's printed rules expressly required that "in case of accident *or* unavoidable *delay* to a train or an engine on the main track *from any cause*, conductors must *immediately* station men with a red flag by day, or red lights and torpedoes by night, *half a mile* distant, in both *directions*, to warn approaching trains. Should it become necessary to *back* a train or engine, great care must be observed, by running very slowly, *and sending a flag-man well in advance*, to insure safety in case of meeting. *Trains are liable to be followed at all times.*" This rule seems to have required the men in charge of No. 3, and it certainly required the men in charge of No. 11, to give the warnings therein indicated, for they were both unavoidably delayed, and No. 11 was upon the main track, and also backing at the time. The mere fact that that was a "signal station" did not do away with the requirement to give signals to trains liable to fol-

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low, for the rule said that "trains are liable to be followed at all times." After reading this rule there can be no doubt but what there was evidence to go to the jury on the question of the defendant's negligence in the particulars just mentioned; and it might well have been claimed that the court was authorized to instruct the jury, upon the undisputed evidence, that the failure to give such signals was negligence.

It is urged that although the men in charge of No. 11 and No. 3 were negligent by failing to give signals, yet that they were all co-employees with the deceased, and hence that the injury was one of the risks of the service, and therefore the plaintiff cannot recover. Several cases are cited in support of this contention. The case most relied upon is *Clark v. C., B. & Q. R. Co.* 92 Ill. 43, where an employee sued his employer, not for any fault or negligence of the latter, but for the fault and negligence of its lessee while using a portion of its track. But we shall not undertake to analyze the cases cited. The question is familiar to the courts and the profession. It is believed that the facts stated in this case distinguish it from any of those cited. The men in charge of No. 11 and No. 3 were employed and paid by the defendant, and were liable to be discharged by it for any neglect of duty. The Central Company had nothing to do with the selection of any of them, and had no power to dismiss them. The deceased and the men in charge of the Central train were not employed nor paid by the defendant, but by another different and independent corporation. Neither corporation had any control over the men in the employ of the other except that upon a few miles of railroad the train-men of the Central Company were required to obey the rules and regulations prescribed by the general manager of the defendant for both companies, and were bound to obey the special orders of the defendant's authorized agents. But a general manager who

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prescribes rules, or a train dispatcher who gives special orders, is not a fellow-servant with the employees in charge of the train. *Darrigan v. N. Y. & N. E. R. Co.* (Conn.), 24 Am. Law Reg. 452. The two corporations got their authority from entirely different charters, were doing an entirely different business, and were wholly independent of each other except as indicated. The agreement mentioned between the two companies imposed obligations and duties from each to the other, and consequently to the respective train-men of each. We cannot hold that the deceased was a fellow-servant with the men in charge of No. 11 or No. 3.

By the Court.—The judgment of the circuit court is affirmed.

See note to this case in 25 N. W. Rep. 549.—REP.

WILL OF WALTER.

November 3 — December 1, 1885.

WILL *written in language which testator did not understand.*

A will drawn in accordance with the instructions of a person of sound mind, and executed by him in due form of law, with full and accurate knowledge of its contents, is valid, although it is written in the English language and the testator did not understand that language.

APPEAL from the Circuit Court for *Sheboygan* County.

An instrument in writing purporting to be the last will and testament of Minna Walter, late of the county of Sheboygan, deceased, was presented for probate to the county court of that county by *George V. Whiffen*, the executor therein named, and was admitted to probate by that court. The instrument is written in the English language.

At the time of her death the estate of the testatrix con-

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sisted of her wearing apparel, some bedding, and about $1,000 in choses in action. It does not appear that she had any other property at her death. In her will she bequeathed her wearing apparel to Sarah Bolt, her neighbor, and the residue of her property to one Herman Millert, who, when the will was executed, was about eighteen years of age, and with whom the testatrix lived. Neither of the legatees were relatives of the testatrix. She left surviving her three brothers residing in Wisconsin, and sisters and descendants of sisters residing in Germany. These were her nearest of kin.

The brothers of the testatrix, *Frederick*, *Martin*, and *Christian Schultz*, appealed to the circuit court from the order of the county court admitting such instrument to probate as the last will and testament of their deceased sister. The issue *devisavit vel non* was tried by the court, and resulted in the following findings of fact:

"(1) That said Minna Walter died on the 6th day of February, 1884, at the town of Sheboygan Falls, in Sheboygan county, and an inhabitant of said county. (2) That the instrument propounded as the will of said deceased was, on the 23d day of November, 1881, signed by said Minna Walter by affixing her mark thereto in the presence of three witnesses, who subscribed the same, and her name was therein signed by Francis Williams in her presence and by her express direction. (3) That said will was written in the English language at the request and according to the directions of said Minna Walter, and she was a German and did not understand the English language; but said Minna Walter fully stated to Francis Williams, who draughted said instrument, through an interpreter who understood both languages, the objects and bequests therein written; and after said instrument was written it was read over to her, and explained in German by said interpreter; and said instrument fully expressed her purposes as there declared.

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(4) That said Minna Walter was at all said times of sound mind, memory, and understanding, and of lawful age and under no constraint. (5) That said instrument so propounded for probate was by said Minna Walter then and there, in the presence of three subscribing witnesses, declared as her will; and said witnesses, at her request, and in her presence and the presence of each other, subscribed the said instrument under the attestation clause as subscribing witnesses, and said witnesses were competent thereto."

From the facts thus found the court determined that the instrument in question is the last will and testament of the deceased, and that the same was duly and legally executed. Judgment was thereupon entered affirming the order of the county court so admitting the instrument to probate. From that judgment the same three brothers of the testatrix have appealed to this court.

Conrad Krez, for the appellants.

Wm. H. Seaman, for the respondent.

LYON, J. The learned counsel for the appellants challenges the accuracy of each and every finding of fact except the first, which states the residence of the testatrix and the date of her death, and that portion of the third which finds she was a German and did not understand the English language. He argues with much ingenuity that the testimony fails to prove any of the propositions of fact thus challenged. After an attentive perusal of the testimony we find ourselves unable to agree with counsel. We think that every fact essential to the validity of the will was established by a fair preponderance of the testimony; or, at least, that there was no such clear preponderance of testimony against any material finding of fact as will authorize this court to set it aside. We do not deem it necessary, in this opinion, to set out the testimony or discuss it

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at length. The statement of our conclusions therefrom must suffice.

Aside from the finding that the testatrix did not understand the language in which her alleged will was written, it cannot be doubted that the other findings of fact fully justify the admitting of the instrument to probate as her last will and testament. We are thus brought to consider the only question of law presented by this appeal, to wit: Should an instrument executed with all the formalities which the law makes essential to a valid execution of a will, which purports to be the last will and testament of the deceased person so executing it, and which expresses his will and intentions, be denied probate for the sole reason that such person did not understand the language in which the instrument was written?

This is an interesting and, perhaps, an important question. It has not heretofore been raised in this court to our knowledge, and the industry of counsel has failed to find a direct adjudication of the question elsewhere. However, in Redfield on Wills, to the statement in the text that "it seems to be well settled that the testator may put his will in any language he may choose," there is a note in which the author says: "We doubt if the common law will allow of a written will being expressed in a language not understood by the testator. That would seem indispensable to any understanding execution of the instrument." Vol. 1, p. 166 (4th ed.), note 8. No case or authority is cited to support the opinion intimated in the last extract. The reason given for this opinion is, in effect, that a person cannot have an understanding of the contents of an instrument unless it be written in a language he knows. True, he may not get such understanding by reading the instrument himself, but there are other methods by which he can be accurately informed thereof, although he may not be able to read understand-

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ingly a word of the instrument. A vast amount of accurate knowledge is alone imparted to the mass of mankind by means of translations from languages understood by but few. Such is the foundation of our belief in very many most important accepted truths in theology, science, and history. Important writings are frequently signed without perusal, the signer relying upon the statement of another who knows what the instrument contains, as to its contents. If the informant states such contents truly, the signer knows just what he has signed. Were an issue made up as to whether the signer of a written instrument knew its contents when he signed it, and the proofs should show that he never read it, but was accurately informed of its contents orally, before he signed it, by a person who had read it, the issue would necessarily be found in the affirmative — that is, that the signer knew the contents of the instrument.

There can be no doubt, we think, that a person who signs an obligation or promise, with knowledge of its contents, imparted to him by parol, is liable thereon, although it may be written in a language he does not understand. The question is not by what means or instrumentalities the signer was informed of the contents of the instrument, but did he know its contents when he signed it.

No good reason is perceived why this is not also true of wills. Of course it is essential to a valid will that the testator should have had an intelligent understanding and comprehension of its contents when he executed it. The formalities required by law in the execution of wills are prescribed for the purpose (among others) of preserving satisfactory evidence that the testator in each case had such understanding of the contents of his will. But the law does not require that he shall read his will before execution, or be able to read it, as a condition to its validity. If such were the law, the blind, or those persons who from

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illiteracy or other cause are unable to read, could never make a valid written testament. The same would be true of many persons who may desire to execute a written will when *in extremis*, and who are otherwise competent to do so. It has long been held that persons thus circumstanced may execute valid written wills. And if the will of any such person is drawn in accordance with his instructions, although not read over to him, it seems now to be settled that, if otherwise sufficient, it is a valid will. 1 Redfield on Wills, p. 57, ch. 3, sec. 6, subd. 5.

We perceive no substantial difference in principle between the cases above referred to and one in which a will is drawn up in a language which the testator does not understand. In cases belonging to either class the court should require satisfactory proof that the testator was correctly informed of the contents of the instrument he was about to execute. Such proof was made in the present case, and in addition thereto it was proved that the instrument was drawn in strict compliance with the instructions of the testatrix in that behalf.

In view of the well-known fact that quite a large percentage of the people of this state do not understand the English language, and of the probability that many wills of such people, written in English, have been admitted to probate, we should adopt the rule here suggested, even though the argument against it were much stronger than it is. Otherwise great mischief might be done by defeating the real will of the testators, carefully expressed, and duly verified in the manner prescribed by statute, and by unsettling estates supposed to be settled, and divesting rights of property believed to be fully vested. If the same circumstances had existed generally in this country when Judge Redfield wrote the intimation above mentioned, we greatly doubt whether he would have thought that the rule there

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suggested (even conceding it to be a rule of the common law) was at all applicable to the condition and circumstances of our people.

Our conclusion is that, because the instrument in question was freely executed by the testatrix in due form of law, with full and accurate knowledge of its contents and in accordance with her instructions (she being of sound mind), it was properly admitted to probate and established as her last will and testament, notwithstanding it was written in the English language, which she could not read or understand.

By the Court.—The judgment of the circuit court is affirmed.

MARTIN, Appellant, vs. ATKINSON, Respondent.

November 3 — December 1, 1885.

(1) Appeal from J. P.: Waiver of defects in complaint. (2) Pleading: Contract.

1. Though no objection to the sufficiency of a written complaint was made in the justice's court, yet that question may be raised on appeal by a demurrer *ore tenus.*
2. In an action for a breach of contract the complaint must contain an allegation that a contract, stating its substance, was made, or a clear statement of facts upon which a contract can be predicated.

APPEAL from the County Court of *Fond du Lac* County.

The action was commenced in justice's court. A trial by jury resulted in a verdict and judgment for the plaintiff, and the defendant appealed to the county court. In the latter court the defendant objected to the introduction of any evidence under the complaint on the ground that it did not state a cause of action. The court sustained the objection and directed a verdict for the defendant. From the judgment entered on such verdict the plaintiff appealed.

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The complaint was as follows:

"The complaint alleges that on or about September 8, 1884, the defendant bought of plaintiff twenty-four fat cattle at Fond du Lac Township, and which were at the time of the sale and delivery about four miles south of the city of Fond du Lac in a pasture. That said cattle were bought to be shipped on the N. W. R'y from here north, and had to be driven through the city from south to north, to the R. R. cattle pens in what is called lower-town. That well knowing that cattle would shrink in weight by being driven from the pasture to town, plaintiff gave the defendant twenty-five pounds shrinkage on each creature if he would weigh them in the usual and customary place and manner for cattle which were sold and approached the city from the south. That the usual and customary place for weighing cattle bought and brought in from the south of the city, was at Ray's scales in Fond du Lac, where all cattle were usually weighed under like circumstances, and where the defendant has usually weighed the cattle bought by him in that vicinity. That though there was nothing agreed upon as to the place of weighing, yet it was contemplated by plaintiff when he gave the shrinkage he did to the defendant, to have them weighed at Ray's, the usual and customary place of defendant's and of plaintiff's weighing the cattle driven into the city from the south. That this intent and contemplation of plaintiff was well known to the defendant, and that that was the custom as stated.

"That on driving the cattle into town and having reached Ray's scales, the plaintiff was about driving the first half or bunch of cattle so sold and delivered to defendant, on to the said Ray's scales, when to his surprise the defendant forcibly resisted, and drove them off, and insisted on their being weighed at the railroad cattle pens, a mile further distant, and refused to have them weighed at Ray's.

"That to so drive them would cause a still further shrink-

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age of the cattle in weight, and as the day was exceedingly hot, every hour they were detained from the scales made a large shrinkage in the cattle. That defendant well knew all this, and knew what the intent and mind of the plaintiff was as to weighing at Ray's, and so knew that that entered into plaintiff's calculations when the sale was made, or had good reason to know it; but purposely and with intent to make all the shrinkage he could to said cattle, and to damage plaintiff and advance his own interests, he caused the cattle to remain hot, thirsty, worried, and to be driven on the highway from the center of the city to its northern part, a distance of about a mile or over, and so shrunk up each creature twenty-five pounds over the twenty-five pounds which he deducted under the agreement, to the great damage of the plaintiff, to wit, in the sum of twenty-six dollars, and for which he claims damage."

D. Babcock, for the appellant, to the point that when a party appears, answers, and goes to trial, in justice's court he waives his objection to the insufficiency of the complaint, cited *Smith v. Whitney*, 22 Wis. 438; 2 Wait's L. & P. 324.

Geo. P. Knowles, for the respondent.

TAYLOR, J. In the county court, upon the case being ready for trial, and a witness having been called on the part of the plaintiff, the defendant objected to any evidence being introduced, on the ground that the complaint did not state facts constituting a cause of action. The county court sustained the motion, and, no offer having been made to amend the complaint, the court directed a verdict for the defendant, and judgment was entered thereon in favor of the defendant, and the plaintiff appeals to this court.

Though this action was commenced in a justice's court, the plaintiff's complaint was in writing, and therefore subject to the objection that it did not state facts constituting a cause of action. And although the courts will, in order

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to sustain the complaint, give its allegations a liberal construction, yet where, after giving it such liberal construction, there is no cause of action stated, the objection must prevail; and, unless the plaintiff asks leave to amend, the objection is fatal to his maintenance of his action.

In the case at bar we think the learned county judge was right in his ruling. There can be no doubt but that the cause of action intended to be set out in the complaint was an action for a breach of contract in not weighing the cattle at the South hay scales, in the city of Fond du Lac, and weighing them at the North scales, a mile or more distant, and that, by so doing, the defendant lessened the weight of the cattle several hundred pounds, and that he deducted the twenty-five pounds agreed to be deducted by the plaintiff from such lessened weight, instead of from the greater weight, had they been weighed at the South scales. The difficulty with the complaint is that it does not allege any contract entered into between the parties that the cattle should be weighed at the South scales in order to fix the weight from which the deduction was to be made, nor is there a statement of facts from which such contract can be inferred.

It seems to us very clear that in an action for a breach of contract there must be an allegation that a contract, stating its substance, was made between the parties, or else there must be a clear statement of facts upon which a contract can be predicated. This complaint fails in both these respects.

By the Court.—The judgment of the county court is affirmed.

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SMITH, Respondent, vs. BRIGGS and another, Appellants.

November 3 — December 1, 1885.

(1) Logs and timber: Conversion: Joinder of parties defendant. (2) Pleading: Joint conversion.

1. An action to recover the value of timber wrongfully cut upon the land of the plaintiff may be brought against the person who did the cutting and one who purchased the timber knowing that it had been so wrongfully cut, jointly. Sec. 4269, R. S.
2. A complaint charging separately a conversion of personal property by one defendant by his sale thereof to the other, and a conversion by the latter by his purchase from the former, states, in effect, a joint conversion and but one cause of action.

APPEAL from the Circuit Court for *Fond du Lac* County.

The case is stated in the opinion.

Moses Hooper, for the appellants.

Silas Bullard, for the respondent.

ORTON, J. The complaint of the respondent, plaintiff, substantially alleges that he was the owner of certain lands, and lawfully entitled to the possession of the same, when the defendant *A. G. Briggs*, by himself, his agents, servants, and employees, wrongfully entered upon the same, and cut thereupon and therefrom 200,000 feet of pine, and 100,000 feet of oak, basswood, and ash timber, and wrongfully removed the same from said premises, and converted the same to his own use, and sold the same to the defendant *Henry Sherry*, who, well knowing that said timber was so wrongfully taken by the said *A. G. Briggs* from said premises, purchased and received the same of and from him, and converted the same to his own use, having notice that the same had been wrongfully cut and removed from said lands of the plaintiff. It is further substantially alleged that the highest market value of said timber so cut, removed, sold, purchased, and converted, at the time it was so cut, removed,

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sold, purchased, and converted, was, and ever since has been, the sum of four dollars per thousand feet, or $1,200; and judgment is demanded of said defendants for such amount, interest, and costs.

This complaint was demurred to by the defendants, on the ground of a misjoinder of defendants and causes of action. From the order overruling such demurrer this appeal is taken.

By a liberal construction of the complaint it would seem that judgment is demanded against the defendants jointly, for the value of the timber at one certain time and since that time; and that time must be when both defendants participated in the conversion, if, in view of the facts alleged, there was any such time. The sale of the timber by *Briggs* to *Sherry* was, of course, participated in by both, and was, therefore, a joint conversion. The allegations of the complaint in relation to the land of the plaintiff from which the timber was wrongfully cut, are only necessary under sec. 4269, R. S., (1) for the purpose of showing the wrongful cutting, to bring the case within said section as to the rule of damages; and (2) for the purpose of showing the plaintiff's title to the timber by his ownership of the land. The complaint is drawn under that section, which allows only the value of the timber to be recovered, and there is no damage to the freehold which can be recovered as in trespass *quare clausum.* If the cutting was wrongful, so also was the conversion by the defendants with notice of it, and then the damages are the highest market value at any time since; but if by mistake, and the conversion by the defendants with notice only of such mistake, then the damages are the value of the timber when cut. The action is to recover the possession or value of the timber cut under this section, and not for the trespass or damage to the freehold as defined by its language, and such value may be recovered as of the time when such timber was "in the possession of the

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trespasser, or any purchaser from him." By this language the trespasser and his purchaser are classed together, and may be joined so far as the value of the timber is concerned, if both the cutting and the purchasing were wrongful.

This is virtually a statutory action, and not at common law. It is, perhaps, nearer an action of trover than any other, with specific damages. We are passing only on the complaint, and that joins both defendants in the wrongful conversion by explicit allegations. We cannot anticipate the answer, whether joint or several. It may be that upon the answer of the defendant *Sherry*, he may sever, and deny the allegation that he purchased with notice of the wrongful cutting; and if such notice is not proved he might be subject to a different rule of damages or defeat the action as to him. This event, however, we have no right to anticipate. The complaint makes a joint cause of action, and this is as far as the inquiry can extend on the demurrer. The purchaser is presumed to be innocent of the trespass. *Tucker v. Cole*, 54 Wis. 539; *Wright v. Bolles Wooden Ware Co.* 50 Wis. 167; *Tuttle v. Wilson*, 52 Wis. 643. But the allegations of the complaint connect the defendant *Sherry* with the wilful trespass, and make him, although a purchaser, liable to the same damages. By our statute the receiver of stolen property, knowing it to have been stolen, is liable to the same punishment as the thief. The trespasser who cut, and the *receiver* of timber knowing it to have been wrongfully cut on the land of another, by analogy, would seem to be equally intimate and joint in the wrong.

It is not uncommon that two or more are joined in the same complaint, and the allegations of the complaint, if true, would make them jointly liable, when by their answers and on the trial it may be shown that some one or more are not jointly liable, and yet the complaint would be good on demurrer. We can go no further than to say that if the allegations of the complaint be proved the plaintiff

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would be entitled to a joint judgment against both of the defendants on account of their participation in the same wilful conversion. We do not decide that the wilful trespasser and the innocent purchaser can be joined, for that case is not here. The selling of the timber by *Briggs*, and its purchase by *Sherry*, constituted a joint and wilful interference with the plaintiff's timber, hostile to his right of property therein, and this is enough to give the plaintiff an action against both. *Dexter v. Cole*, 6 Wis. 319. The charges against each defendant are in separate counts or statements, but that does not change the unity of the cause of action, or make two separate and distinct causes of action. When read together, as they should be, there is stated at least one joint wilful conversion, and that is sufficient.

The question is not without difficulty; but when the conversion and the rule of damages are the same, it would seem better to make the action a joint one than to bring a separate action against each of the tort-feasors, as a recovery in one might not be a bar to the other, and a multiplicity of actions is not favored.

By the Court.— The order of the circuit court is affirmed.

PRIEST, Respondent, vs. VARNEY, Appellant.

November 3 — December 1, 1885.

(1) Waiver of notice of motion. (2) Appeal to S. C.: Recitals in order, when treated as verities. (3) Compulsory reference: Long account.

1. The appearance of a party without objection upon the hearing of a motion based upon certain papers, etc., is a waiver of notice that the motion would be based thereon.
2. In the absence of a bill of exceptions showing the contrary, the recitals in an order appealed from will be treated as verities.

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3. Recitals, in an order directing the reference of a cause, that it appears from the pleadings and the admissions of counsel that the plaintiff's bill of items contains seventy items and the defendant's bill of particulars contains thirty items, that the trial will require the examination of a long account, etc., are held sufficient to authorize the reference, notwithstanding an objection thereto.

APPEAL from the Circuit Court for *Fond du Lac* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This action is to recover for services rendered and moneys expended by the plaintiff as attorney for the defendant. The answer denies the extent and value of the services and the amount of money expended. On application of the plaintiff, the court, July 15, 1884, ordered that the issues be referred to a commissioner to hear and decide the whole issue and report thereon to the court. This order recites the appearance of the defendant by his attorney, and that it appears "from an inspection of the pleadings and the admission of counsel for the *defendant*, that the trial of issues of fact in the action will require the examination of a long account on each side." The defendant's attorney thereupon moved the court, upon his own affidavit, to strike out of said order the words "the admission of counsel for the defendant." That motion was resisted by a counter-affidavit on the part of the plaintiff; and on the hearing thereof the court, August 6, 1884, modified that part of the recitals in the order which are quoted above by striking out the word "defendant," and inserting in lieu thereof the words "parties that the plaintiff's bill of items contains seventy items and the defendant's bill of particulars contains thirty items;" but said order in other respects was allowed to remain the same.

In June, 1885, the defendant moved the court, upon an affidavit, to set aside and vacate said order of reference so modified, "for the reason it was improvidently and illegally

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granted." That motion was resisted by an affidavit on the part of the plaintiff, and the court thereupon made an order thereon of which the body is as follows: "This case having come on to be heard on notice of motion by the defendant to set aside and vacate the order of reference made therein and dated July 15, 1884, and it appearing that the original order, bearing date on said last-named day, had been modified by the court on the application of the defendant on the 6th day of August, 1884, after hearing Mr. Blair for the defendant and Mr. Bragg for plaintiff, the court refuses to reconsider its former decision, and denies the motion, with ten dollars costs. Dated June 15, 1885." This order was excepted to by the defendant.

July 9, 1885, the defendant appealed from both of said orders to this court.

A. M. Blair, for the appellant, contended, *inter alia*, that the first order was erroneous (1) because the notice of motion did not state what the motion would be founded upon, and (2) because the action is not one in which the court can order a reference against objection. The recital as to the admission of counsel that the plaintiff's bill of items contains seventy items, etc., was without foundation. To authorize a compulsory reference there must be an account to be examined, and that account must be a long one. *Batchelor v. A. C. Ins. Co.* 1 Sweeny, 346; *M'Cullough v. Brodie*, 13 How. Pr. 346; *Sharp v. Mayor*, 18 id. 213; *Parker v. Snell*, 10 Wend. 577; *Van Rensselaer v. Jewett*, 6 Hill, 373; *Townsend v. Hendricks*, 40 How. Pr. 143; *Kain v. Delano*, 11 Abb. Pr. (N. S.), 29; *Whitaker v. Desfosse*, 7 Bosw. 678; *Knips v. Stefan*, 50 Wis. 286; *Swift v. Wells*, 2 How. Pr. 79; 2 Whittaker's Pr. 236. Notice of the motion for a reference must be given, founded upon an affidavit showing that issue has been joined and that the trial will require an examination of a long account, and how, and also founded upon the pleadings. 3 Wait's Pr. 261; *Goodyear v. Brooks*,

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4 Rob. (N. Y.), 682; *Dutcher v. Wilgus*, 2 How. Pr. 180; *Keeler v. Plank Road Co.* 10 id. 11. If the first order was not authorized from the evidence before the court, it should have been vacated on motion. *Brinks v. Republic F. Ins. Co.* 2 Thomp. & C. (N. Y. Sup. Ct.), 550.

Edw. S. Bragg, for the respondent, to the point that the action was one in which a compulsory reference might be ordered, cited *Carpenter v. Shepardson*, 43 Wis. 406; *Monitor Iron Works v. Ketchum*, 47 id. 179; *Thompson v. Seimer*, 40 How. Pr. 246; *Martin v. Windsor Hotel Co.* 70 N. Y. 102.

CASSODAY, J. It is competent for a party to waive notice of a motion. An appearance at the hearing generally by an attorney is such waiver. It is competent for a party to waive notice of the papers or records upon which a motion is based. A hearing upon the merits upon an "inspection of the pleadings" by the court, "and the admission of counsel for the parties that the plaintiff's bill of items contained seventy items and the defendant's bill of particulars contained thirty items," without any objection for want of such notice, was a waiver of notice that such motion would be based upon such pleadings and bills of items and particulars. The recitals in the order of July 15, 1884, of such admissions must, in the absence of a bill of exceptions showing otherwise, be regarded as verities. *Bunn v. Valley Lumber Co.* 63 Wis. 630. The recitals in that order, as modified, were sufficient to authorize the reference. In fact, the case seems to be a proper one for a reference under the decisions of this court. This being so, the reasons given in the notice to set it aside eleven months afterwards could not exist. It follows that the court was justified in refusing to reconsider its former decision and denying the motion.

By the Court.—Both of the orders of the circuit court are affirmed.

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VOELL, Appellant, vs. KELLY, Respondent.

November 4 — December 1, 1885.

Attorney at law: Lien upon judgment: Notice: Settlement: Fraud.

[1. Whether an attorney has a lien upon a judgment when the cause of action was not assignable, not determined.]

2. In order to preserve the lien of an attorney upon the judgment in an action, against a settlement made in good faith, notice of his claim must be given.

3. A settlement effected by the attorney of one party with the opposite party, in the absence of the attorney of the latter, should be closely scrutinized, and will be set aside where there is any appearance of fraud or undue influence.

APPEAL from the Circuit Court for *Fond du Lac* County.

The case is fully stated in the opinion.

A. M. Blair, for the appellant, contended, *inter alia*, that an attorney has a lien upon a judgment obtained for his client, and that such lien is not measured by the taxable costs. If the value of his services is fixed, he has a lien for that amount; if not fixed, he has a lien for what they are reasonably worth. *Rooney v. Second Ave. R. Co.* 18 N. Y. 368; *Ward v. Syme*, 9 How. Pr. 16; *Haight v. Holcomb*, 16 id. 173; *Fox v. Fox*, 24 id. 409; *Marshall v. Meech*, 51 N. Y. 140; *Williams v. Ingersoll*, 89 id. 508; *Hall v. Ayer*, 9 Abb. Pr. 220. The lien is good without notice to anyone, except as against the defendant who in good faith pays the judgment in full to the plaintiff. *McDonald v. Napier*, 14 Ga. 89.

For the respondent there was a brief by *Duffy & McCrory*, and oral argument by *Mr. McCrory*.

COLE, C. J. The attorney for the plaintiff insists that the order denying the motion to set aside the satisfaction of the judgment herein, and for leave to issue an execution for the amount remaining unpaid on the same, should be reversed

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for three reasons: (1) Because the plaintiff's attorney had a lien upon the judgment for his fees in the case, and the satisfaction was in fraud of his rights; (2) because the satisfaction was without consideration and not binding upon the plaintiff; and (3) because the satisfaction was obtained through collusion and fraud with intent to cheat the plaintiff out of a part of her judgment and her attorney out of his fees.

The action was for damages for a personal injury to the plaintiff, caused by the negligence of the defendant. The amount recovered in the circuit court was $100 damages and $45.81 costs. It appears from the affidavit of Mr. Blair (plaintiff's attorney) that he had the sole management of the action from its commencement; that the plaintiff is poor, destitute of means to carry on the suit, and before it was commenced it was mutually agreed between the plaintiff and him that he should trust her for his fees for his services until the action was determined, and take his pay out of the judgment recovered, if any, and have a lien thereon for the same; that he has never been paid nor received anything for his services. It is admitted that no notice of this lien was given to the defendant or his attorneys. The affidavits used on the motion show that the plaintiff, without any consultation with her attorney, without his knowledge even, made an agreement with the attorney of the defendant to accept in satisfaction of this judgment $68 and the costs. The judgment was satisfied of record upon the payment of this sum, less by $32 than the amount due thereon. This application to vacate the satisfaction is made as well on behalf of the plaintiff as her attorney.

As to the first ground relied on for setting aside the satisfaction, it is doubtful if the attorney has any lien upon the judgment for his fees which would prevent his client from settling and discharging it. In *Kusterer v. Beaver Dam*, 56 Wis. 471, it was held that "a party having a cause of ac-

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tion, in its nature not assignable, cannot, by an agreement before judgment or verdict thereon, give his attorney any interest therein, or in the costs which would be incident to a recovery, which will survive the settlement of the cause of action." Whether a different rule should obtain where the action has gone to judgment is a point not necessarily involved in that decision. There are cases which hold "after judgment the attorney who has procured it has a lien upon it for his costs. This lien is upheld upon the theory that the services and the skill of the attorney have procured the judgment. There is then something upon which a lien can attach, and the courts uphold the lien by an extension to such cases of the principle which gives a mechanic a lien upon a valuable thing which, by his skill and labor, he has produced." *Coughlin v. N. Y. C. & H. R. R. Co.* 71 N. Y. 443, 448. We shall not stop to inquire whether this doctrine of giving the attorney a lien after judgment, but denying it before judgment, rests upon solid grounds or not; for, as we understand, it is necessary in either case in order to preserve the right against a settlement made in good faith that notice should be given, which was not done in the present case. *Courtney v. McGavock*, 23 Wis. 620. So it is doubtful if those authorities which have gone the furthest in protecting the attorney's lien would hold that it attached here. Be that as it may, upon the other grounds we think the satisfaction should be set aside, because under the circumstances it is fraudulent as to the plaintiff. Such settlements effected by an attorney on the one side with the opposing party on the other should be closely scrutinized, and should never be sanctioned where there is any appearance that undue influence was used in effecting them.

In this case the plaintiff's husband acted for or with her in making the settlement. But the affidavits conclusively show that the settlement was made by the defendant's at-

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torney with them without the knowledge of her attorney, though he was near at hand and might and should have been consulted in the matter. The plaintiff says in her affidavit, in substance, that her husband informed her that one of defendant's attorneys had talked with him about settling up the matter, and said to her husband he thought the defendant would take the case to the supreme court, and if he did the plaintiff would never realize anything from the judgment, as it would take all to pay her lawyer and costs; that she would have to pay $18 to get the printing done in the case on her side before it could be heard; that this was said to induce her and her husband to believe it best for her to take what was offered by the defendant; that she was wholly unacquainted with business matters of all kinds, had not seen her attorney since the cause was tried, and did not know what to do; that defendant's attorney did not want her to say anything to her attorney about the settlement; that the matter must be attended to at once or it would be too late; that from the statements communicated to her she was led to believe, and did believe, that unless a settlement was made as proposed she would never receive anything, and she told her husband that she did not know anything about the business, and he could do what he had a mind to, but that if she had fully understood the matter, and what her rights were, she would never have consented to the settlement which was made. On all material points the statements of the plaintiff are corroborated in the affidavit of her husband.

The counter-affidavit of the attorney who acted for the defendant in making the settlement denies some of these statements. Among other things, he says he did not request that nothing should be said to plaintiff's attorney about the matter, or to any one else, how it had been settled, or as to what was going on about it during the negotiations; but, on the contrary, that the plaintiff's husband

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enjoined upon him not to say anything about what the plaintiff had agreed to take to any one. Still the important fact remains admitted that the attorney made the settlement with the plaintiff, who very imperfectly understood her rights, in the absence of her attorney and without his knowledge. The plaintiff certainly had no one to advise her as to the probable fate of the suit if taken to the supreme court, or what expense she would incur by that litigation. Under the circumstances, it was the plain, professional duty of defendant's attorney to have told both her husband and plaintiff to consult her attorney in regard to the settlement. In the language of the chief justice in *Watkins v. Brant*, 46 Wis. 419, no such transaction should ever be consummated as it were *ex parte* in a lawyer's office. The defendant's attorney presumably acted without conscious bad faith in the matter; but the effect was the same,—an undue advantage was obtained over the plaintiff. And we hold that a settlement brought about in the way this was is in the nature of a fraud upon the plaintiff, and does not bind her. The remarks made by the chief justice in the case just cited, and by Mr. Justice TAYLOR in *Bussian v. M., L. S. & W. R. Co.* 56 Wis. 326, as to what professional ethics require under such circumstances, are exceedingly appropriate to guide the conduct of attorneys in such a case.

The order of the circuit court is reversed, and the cause is remanded with directions to set aside the satisfaction of the judgment, and to grant leave to issue an execution thereon for the amount remaining unpaid.

By the Court.—It is so ordered.

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FOWLER and others, Trustees, etc., Appellants, vs. SCOTT, Respondent.

November 4 — December 1, 1885.

BROTHERTOWN INDIANS: APPORTIONMENT OF LANDS: EVIDENCE. *(1) After allotment, patent to others void. (2-4) Evidence of allotment: Report of commissioners: Maps. (5) Tribal records: "Ancient instruments." (6) Persons of same name: Presumptions. (7) Validity of trust under act of Congress, April 20, 1878.*

PLEADING. *(8) Ejectment: Want of title in plaintiff.*

1. An allotment of a portion of the Brothertown reservation to a member of that tribe under the act of Congress of March 3, 1839, vested in the allottee the whole beneficial interest in the land allotted, and such allotment never having been vacated or set aside, a patent for the same land subsequently issued to certain persons in trust for the Brothertown Indians, under the act of April 20, 1878, is void.
2. The commissioners elected under the act of Congress of 1839 to make partition of certain lands among the Brothertown Indians, were required to make a full report showing the name of each person to whom land was allotted and the quantity allotted to each, with the metes and bounds or other definite description of each parcel, and to accompany said report with a map showing the divisions and partitions. In an action affecting the title to a portion of such lands there was offered in evidence a copy of the commissioners' report duly certified by the commissioner of the general land office, together with a map accompanying the same. The map was certified to by the surveyor as having been made for the use of the general land office, but was not signed by the allotment commissioners nor authenticated by the separate certificate of the commissioner of the land office. It corresponded, however, almost exactly with the report, and also contained certain mistakes referred to in an amendatory report. *Held*, that it was sufficiently identified as the map made and returned by the allotment commissioners.
3. The report of the commissioners, excluding the map, gave the names of the allottees and the number of the lot awarded to each, but did not specify the number of acres in each allotment or give any definite description thereof. The map itself supplied these deficiencies. *Held*, that the map was a part of the report; and that where the other portions of the report were silent, an allot-

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ment on the map was sufficient to pass the whole equitable title to the allottee.

4. Evidence that another map of the lands in question, like the one above mentioned but drawn upon a smaller scale and without the names of the allottees thereon, was also connected with the report, having been sent to the land office later, would not have altered or impaired the effect of the larger map as a part of the report, and the exclusion of such evidence, therefore, if error, was immaterial.
5. The tribal records of the Brothertown Indians, purporting to have been made by the "town clerk," and shown to have been for many years in the office of the town clerk of Brothertown, are held to be *ancient instruments* and, as such, admissible in evidence to show an allotment of lands within their reservation to members of the tribe in severalty, made at a "town meeting" in 1835.
6. The commissioners elected to make partition of lands among the Brothertown Indians in 1839, allotted one tract to "Hannah Paul," and another to "the wife of Solomon Paul" whose name, in fact, was Hannah Paul. *Held*, that under the circumstances of this case it will not be presumed that there was but one person of that name, or that the allotments were not made to different persons.
7. *Quære* whether the act of Congress of March 3, 1839 (5 Stats. at Large, 349), put an end to the existence of the *tribe* of Brothertown Indians as such, and whether, if so, the act of April 20, 1878 (20 Stats. at Large, 513), did not restore the tribal functions sufficiently to enable the members of the tribe, as such, to take as beneficiaries of the trust thereby created.
8. In ejectment the want of title in the plaintiff is purely a legal defense and is well pleaded by a general denial.

APPEAL from the Circuit Court for *Fond du Lac* County.

Ejectment for the north half of the west forty-five acres of lot 7 of the town of Brothertown, county of Calumet, and state of Wisconsin.

The plaintiffs claim the lot under a patent issued to them, and to deceased co-trustees, by the United States, dated June 10, 1878, which purports to grant to such trustees for the Brothertown Indians, among other lands, the lot in controversy. This patent was issued in attempted compliance with ch. 63 of the Laws of Second Session of the Forty-fifth Congress, entitled "An act to authorize the issue of a patent of certain lands in the Brothertown reservation, in

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the state of Wisconsin, to the persons selected by the Brothertown Indians," approved April 20, 1878. 20 Stats. at Large, 513.

The defendant claims that the west forty-five acres of said lot 7 was set apart and allotted to one Hannah Paul, wife of Solomon Paul (both being members of the tribe of Brothertown Indians), in 1840, pursuant to an act of Congress in that behalf entitled "An act for the relief of the Brothertown Indians in the territory of Wisconsin," approved March 3, 1839. 5 Stats. at Large, 349. He also claims to be the owner in fee of the lot in controversy by virtue of mesne conveyances from Solomon Paul and wife to him.

After a trial of the action before the court, without a jury, the court gave judgment for the defendant, dismissing the complaint on the merits. This appeal is by the plaintiffs from such judgment.

The findings of fact upon which the judgment is founded are as follows:

"1. That prior to the dates hereinafter named, and up to the year 1839, the Brothertowns were a tribe of Indians residing in the state of Wisconsin, preserving and maintaining tribal usages, customs, and government among themselves, and that said tribe of Brothertowns was a branch or part of the tribe or nation known as the Menominee Indians.

"2. That by a treaty between the United States and said tribe of Menominee Indians, dated February 8, 1831, and a further treaty between the same parties, dated October 27, 1832, there was secured and set apart to the Brothertown tribe a tract of land lying on the east side of Lake Winnebago, in the territory of Wisconsin, comprising 23,040 acres, and the possession of said tract was entered into by said tribe; that thereafter said tract of land was subdivided among the various members of said tribe in accordance

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with their tribal government at that time existing, and that, in the year 1834, a tract of land, corresponding with and being the same as lot seven (7) of the Brothertown reservation, mentioned in the complaint, was assigned and set apart by the unanimous consent of said tribe to one Solomon Paul, who was then a member of said Brothertown tribe; that said Solomon Paul was in the occupancy of said land under said assignment at and prior to the allotment and apportionment of said reservation under the act of Congress of the year 1839, hereinafter mentioned.

"3. That by an act of Congress, entitled 'An act for the relief of the Brothertown Indians in the state of Wisconsin,' approved March 3, 1839, it was enacted that said tract of 23,040 acres of land, reserved to said Brothertown tribe as aforesaid, might be partitioned off and divided among the different individuals comprising said tribe by commissioners elected in accordance with said act, and that after such partition and division the several pieces and parcels should be held by the members of said tribe, severally and separately, in fee simple. That said commissioners were required by said act to make to the president of the United States a full report of such apportionment, giving the name of each person to whom any land was apportioned, with the description and quantity assigned to each, and were to accompany said report with a fair and accurate map of the whole, showing the divisions and partitions referred to in the report.

"That the said commissioners in their allotment under said act of Congress duly assigned and allotted to the 'wife of Solomon Paul,' Hannah Paul, the west forty-five acres of lot 7 of the Brothertown reservation aforesaid, which included within it all of the premises described in the complaint in this action, but by mistake and inadvertence omitted the same from the report made as required by said act, except in so far as the same appears upon the map

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which accompanied the said report, and which I find to be a part of said report.

"That since said allotment of said west forty-five acres of said lot 7 the premises described in the complaint have been continuously claimed by said Hannah Paul, 'wife of Solomon Paul,' and her grantees, and the various parties through whom, by successive conveyances reaching back to said Hannah Paul, the defendant derives his title, and this defendant, down to the present time.

"4. That at and prior to the date of the patent to the plaintiffs set forth in the complaint the plaintiffs had notice of and were aware that the premises aforesaid had been allotted under said act of Congress of March 3, 1839, to said Hannah Paul, and that the same had since such allotment been claimed and occupied by her and her grantees.

"5. That the defendant is the equitable owner of the premises described in the complaint, and is entitled to retain the possession thereof.

"6. That the title which the plaintiffs received by the patent mentioned in the complaint, they received for the benefit of the defendant, and the benefit of such patent inures to the defendant in this action.

"7. That the defendant is entitled to the possession of the premises described in the complaint, and does not unlawfully withhold the same from the plaintiffs."

Elihu Colman, for the appellants.

For the respondent there was a brief by *Spence & Hiner*, and oral argument by *Mr. Spence*.

Lyon, J. If the west forty-five acres of lot 7, in the Brothertown reservation, was legally allotted to Hannah Paul, although never patented to her, such allotment vested in her the whole beneficial interest in the lot, and the patent subsequently issued to the plaintiffs and their deceased co-trustees (under which the plaintiffs claim) is void. In such

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case the government has, at most, only the naked legal title, which it holds in trust for the original allottee and her representatives or grantees, and cannot convey it to a stranger. If authority be desired to propositions so manifestly correct and just, it may be found in the language of the supreme court of the United States in *Wirth v. Branson*, 98 U. S. 118. It is there said: "The rule is well settled by a long course of decisions that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has been pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside." In that case a bounty land-warrant had been lawfully located on the land claimed, and subsequently a patent for the land was issued to another adversely to the claim under the warrant. The same principle is clearly applicable to the present case.

If the allotment was made to Hannah Paul, every necessary act was done to entitle her to a patent for the lot, and such allotment was never vacated or set aside. In that case it is quite immaterial whether the defendant has or has not succeeded to her title. The plaintiffs must recover, if at all, on the strength of their own title. That failing, their action fails. The trial court found such allotment was legally made, and dismissed the complaint on the merits. If the testimony supports the finding, the judgment is correct; otherwise, probably, it cannot be upheld.

Does it sufficiently appear that the west forty-five acres of lot 7 was legally allotted to Hannah Paul? The documentary evidence bearing upon this question consists of a copy of the report made by the commissioners, pursuant to the act of 1839, from the office of the register of deeds of

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Calumet county, certified by the commissioner of the general land office in the form required by an act of Congress of 1812 (5 Stats. at Large, 716), which was held sufficient in *McLane v. Bovee*, 35 Wis. 27. Accompanying this report was a map, in the register's office, of the Brothertown reserve, divided into lots, with the name of the person to whom each lot was allotted written thereupon. It is certified to by the surveyor under date of July 13, 1840, as having been made for the use of the general land office, but is not signed by the allotment commissioners, or authenticated by the separate certificate of the commissioner of the land office. Such report and map were put in evidence by the defendant, under objection by the plaintiffs to the map as testimony. Two books were also offered in evidence by the defendant, and received under like objection, claimed to contain the tribal records of the Brothertown Indians before the allotment of their lands in severalty. From these it appeared that, by a unanimous vote of the tribe, at a meeting thereof denominated a town meeting, held September 2, 1835, the land constituting lot 7 was assigned in severalty to Solomon Paul. A large number of lots were, in like manner, assigned to various members of the tribe.

In the report of the allotment commissioners, excluding the map, the east fifty acres of lot 7 is allotted to Solomon Paul, but no mention is made of the west forty-five acres thereof. On the map the east fifty acres is marked with the name of Solomon Paul, and on the west forty-five acres is written "wife of Solomon Paul." The defendant also introduced oral testimony (received under objection) to the effect that Hannah Paul was the wife of Solomon Paul; that they went into possession of lot 7 under the tribal allotment of 1835, and still lived thereon when the allotment was made under the act of 1839; and that the commissioners did, in fact, allot the west forty-five acres of that lot to Hannah Paul. It was stipulated on the trial that

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Solomon Paul and wife conveyed the lot in controversy, in 1855, to a grantor (through mesne conveyances) of the defendant.

The learned counsel for the plaintiffs maintains that the map is not sufficiently identified as the map returned by the allotment commissioners to the general land office; and, if identified, that it is no part of the report of the commissioners. He argues therefrom that the entry, "wife of Solomon Paul," on the west forty-five acres of lot 7, as delineated on the map, does not constitute an allotment, and, the report making no mention of an allotment of that parcel of land to her, none was ever made. These propositions will now be considered.

As to identity, the map itself furnishes sufficient intrinsic evidence that it was made and returned by the allotment commissioners. The report mentions nearly 500 allotments, giving the name of each allottee, and the number and fraction of his or her lot. An examination of the map shows that, with but very few exceptions, and those manifestly accidental, the map corresponds throughout with the report. The act of 1839 required the commissioners to accompany their report with a map. Finding a map in the proper office which corresponds so nearly with the report, it must be presumed that they did their duty, and that the map before us was made under their direction, and returned by them, as a compliance with the requirements of the act of 1839 in that behalf.

There is still another proof of the identity of this map. In 1845 the allotment commissioners made an amendatory return to the commissioner of the land office, pointing out certain errors which had been discovered in the report and map. In one case they say: "Fractions 1, 2, 3, 4, 5, of west half of lot 148, were designated for Benjamin G. Fowler. In this case the map in your office is wrong in setting the aforesaid five fractions to Thos. Kiness." Looking at the

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map, we find those fractions marked to Thos. Kiness. This is very cogent proof that we have the right map before us.

Is the map part and parcel of the report? Section 5 of the act of 1839 requires the commissioners, after having made partition and division of the reservation as thereinbefore provided, to make "a full report of their proceedings in the premises, setting forth the name of each person to whom they have apportioned any part of said land, the quantity apportioned or allotted to each, with the metes and bounds or other definite description of each several piece or parcel of land, and they shall accompany the said report with a fair and accurate map of the whole, showing the divisions and partitions aforesaid." The report, excluding the map, gives the names of allottees and the number of the lot, or fraction of a lot, awarded to each. In but few cases does it specify the number of acres in a given allotment. Neither does it purport to give metes and bounds, or any definite descriptions of the parcels of land allotted. Without the map the descriptions are unintelligible, and the report would utterly fail to come up to the requirements of the act of 1839. But read the map with the report, and as an integral part of it, and the provisions of the act above quoted are complied with in every particular. It seems very clear to us that the map should be so read and regarded, and that the act should be construed as meaning that the report should contain the map therein required. It necessarily results from these views that the map is just as high evidence of an allotment as are the other portions of the report; and if, as in this case, the latter is silent, an allotment on the map is sufficient to pass the whole equitable title to the land to the allottee, with the full right to the possession thereof, leaving in the government only the naked legal title. The learned circuit judge so held.

If other proof were required to establish the fact that

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the west forty-five acres of lot 7 was allotted to Hannah Paul, such proof is found in this record. The books already mentioned, which contain tribal records previous to the allotment, show that allotments of portions of the Brothertown reserve were made by the tribe to many of the members thereof, in severalty, and that lot 7 was so allotted to Solomon Paul in 1835. These allotments usually contained 100 acres each, but lot 7 abutted Lake Winnebago on the west, and was fractional, containing but ninety-five acres. The act of 1839 distinctly recognized the existing laws, customs, usages, and agreements of the tribe, and directed that lands then held or possessed by members of the tribe in severalty should, as far as the same could consistently be done, be allotted to the several occupants thereof, unless a person occupied more than he was justly entitled to, in which case the overplus might be apportioned to others. See sections 2, 4. A comparison of the tribal allotments of 1835 with the map shows that these requirements of the act of 1839 were faithfully executed by the commissioners.

It satisfactorily appears that Solomon Paul went into possession of lot 7 under the tribal allotment, and was living thereon with his wife, Hannah Paul, when the allotment under the act of 1839 was made. The last allotments usually contained fifty acres each, in one body, and ten acres elsewhere. So the commissioners appropriated the east fifty acres of lot 7 to Solomon Paul. The east side of this tract abutted a highway, and it is very probable that the dwelling of the allottee and his wife and the principal improvements were situated thereon. Under these circumstances it would be very natural that the wife should have desired the balance of the farm to be allotted to her, and that the commissioners should have so allotted it. Moreover, the presumption is (there being no proof to the contrary) that Hannah Paul remained in actual possession and occupancy of the portion of lot 7 in controversy in this action until

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she and her husband conveyed the same in 1855. These facts, aside from the parol proof that the west forty-five acres of lot 7 was actually allotted to her, strongly corroborate the accuracy of the view above expressed that the entry on the plat of that tract in the map, "wife of Solomon Paul," was intended to be and in fact was an effectual allotment thereof to her.

It was argued that the tribal records were not sufficiently authenticated to entitle them to be read in evidence. We think otherwise. They are *ancient instruments* within the meaning of that term as used in the law of evidence. They purport to have been made by a tribal officer denominated a "town clerk." Such an officer is recognized by the act of 1839, which provides, in section 5, that the report and map of the allotment commissioners, or a copy thereof, shall be deposited "with the town clerk of said tribe." They were proved to have been in the office of the town clerk of Brothertown for many years, and there was other testimony tending to show that they were the tribal records. Besides, the books in which these records are contain abundant intrinsic evidence of a most interesting character, of the genuineness of the records. These facts render the records admissible in evidence. See 1 Greenl. Ev. §§ 21, 141, 570, and notes.

The commissioners made an allotment to "Hannah Paul," by name, of fifty acres in a portion of the town remote from lot 7. It is argued that, because there is no proof that there were two allottees of that name, it must be assumed that the wife of Solomon Paul is such allottee, which, of course, would make strongly against the claim that she was the allottee of a part of lot 7. It is sufficiently evident, however, that when one allotment was made to "Hannah Paul" and another to "the wife of Solomon Paul" the commissioners were making allotments to two different persons. The allotments may have been made in that

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form to distinguish between two of the same name, or the commissioners may not have known the name of the wife of Solomon Paul. The former is the more probable reason. After so great a lapse of time it ought not to be presumed that there was but one Hannah Paul in the tribe, when the map contains intrinsic evidence that there may have been, probably were, two of that name. A witness introduced by the defendant testified that his mother was a Brothertown woman, named Hannah Paul, and that she had land in the north part of the town. The land allotted to Hannah Paul was on the north line of the town. Whether or not the mother of the witness was ever the wife of Solomon Paul does not appear. The testimony is not very significant, and we have given no weight to it.

Counsel for the plaintiffs offered in evidence a copy of a map of Brothertown, duly authenticated by the certificate of the commissioner of the general land office, and offered to testify that he examined the records of that office in May, 1883, and found two maps connected with this allotment report, one similar to that in evidence, and the other the original of the map so offered by him in evidence; also that he found a letter with the latter map showing it was sent to the office after the other map had been sent. The map and testimony were not received. If the offered testimony had been received, it could have had no influence upon the determination of the case. The rejected map is like the other, except it is drawn on a smaller scale and none of the names of allottees are written upon it. The offered testimony may be considered as in the case, and the map may be considered a part of the report of the allotment commissioners, yet it does not, in the least, affect the other map, or impair its standing as a part of such report. The testimony and map, had they been received, would not have helped the case of the plaintiff, and their rejection (if erroneous) was an immaterial error.

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The point was made in the argument that the equitable title claimed by the defendant to the *locus in quo* is not well pleaded. We do not reach that question, because we hold that the plaintiffs have failed to establish their title thereto. The want of title in the plaintiff is purely a legal defense, and such defense was well pleaded by the general denial in the answer.

It was pleaded in the answer as a defense to the action, and argued by the counsel, that the act of 1839 was fully executed about January 1, 1840, and that, by the provisions of such act, the tribe of Brothertown Indians ceased from that time to have any existence as a nation, body, or tribe; hence that there are no *cestuis que trust* capable of taking any beneficial interest under the patent issued to the plaintiffs and their deceased co-grantees in trust, and such patent is void for that reason. Having reached the conclusion on other grounds that the plaintiffs cannot maintain the action, it becomes unnecessary to decide on this appeal whether those propositions, or any of them, are well taken.

A determination of the validity of this defense was specially requested by counsel, for the alleged reason that other similar actions, founded on the same patent, are pending, in which the question may and probably will be material. Because of this the writer takes the liberty to suggest that it is at the least doubtful whether the tribal character of the Brothertown Indians has entirely ceased. The act of 1839 provides that, when its provisions in certain specified particulars have been executed, the rights of those Indians "as a tribe or nation, and their power of making and executing their own laws, usages, or customs as such tribe, shall cease and determine." But their right to receive annuities due them from the state of New York or the United States, the same as though the act had not been passed, is expressly reserved to them. Sec. 7. It would seem from the last provision that their tribal character is sufficiently

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preserved to enable them in their capacity as a tribe to receive annuities. If so, why may not the members of the tribe, as such, be competent beneficiaries of a trust to receive money from other sources.

Again, the commissioners, under the act of 1878, in their report, make the following statement of the manner in which they disposed of a mill, and its appurtenances: "A mill, which was built a few years ago at the expense of the nation, together with all its water privileges, property, and appurtenances, as secured and released to the nation at former periods, by instruments in the possession of our authorities, has been assigned to a member of our tribe (elected at town meeting held for the purpose) in trust for the nation, who are the proprietors." It does not appear that the United States has ever made any objection to such disposition of the mill property. Should that property be hereafter sold by competent authority, no provision being made for distributing the proceeds, would not a court of equity direct the same to be distributed to the Brothertown Indians, according to the former usages, customs, and regulations of said tribe? In other words, would not the court regard them as competent to take as beneficiaries under a trust?

The act of 1878 disposes of the proceeds of the lands patented under it to trustees precisely as has just been suggested, and there seems no insuperable obstacle in the way of ascertaining who are the individual beneficiaries. Even if the tribal functions had entirely ceased before that act was passed, does not the act sufficiently restore them to enable the members of the tribe, as such, to take as beneficiaries of the trust created by the act?

The writer strongly inclines to the opinion that all of the questions here suggested, especially the last, should be answered in the affirmative.

By the Court.— The judgment of the circuit court is affirmed.

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MORGAN, Appellant, vs. PIERRON, Respondent.

November 4 — December 1, 1885.

Estoppel: Credit obtained on faith of ownership of property.

A father stocked a farm and placed his son thereon to carry it on and make his living therefrom. The son contracted a debt for which the stock was attached. In an action of replevin brought by the father it appeared that he knew nothing of the debt at the time it was contracted, and it did not appear that he knew that the son was holding himself out as the owner of the property for the purpose of obtaining credit, nor that the debt in question was contracted on the faith that the son was the owner. *Held*, that the father was entitled to recover.

APPEAL from the Circuit Court for *Fond du Lac* County.

The action is replevin for a lot of sheep, lambs, and wool, seized by the defendant, as sheriff, by virtue of a writ of attachment in his hands, which was sued out by one Murray against the property of Lysand Morgan, the son of the plaintiff. The verdict is that the plaintiff was not the owner of the property replevied, and that the same was not wrongfully detained by the defendant. A motion of the plaintiff for a new trial was denied, and judgment for the defendant entered pursuant to the verdict. The plaintiff appeals from such judgment.

The cause was submitted for the appellant on the brief of *Gabe Bouck*, and for the respondent on that of *Geo. P. Knowles*.

LYON, J. The evidence is undisputed that, as between the plaintiff and his son Lysand, the father was the owner of the property in controversy. The plaintiff purchased and stocked a farm, and put his son on it to carry it on and make his living therefrom, if he could. There was never any transfer of the property to the son. The property seized by the sheriff was part of such stock, and the product thereof.

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Considerable testimony was given on the trial, on behalf of defendant, tending to show that the plaintiff had in various ways allowed his son to treat the farm, and property pertaining to it, as his own. The court submitted to the jury the question whether the plaintiff had clothed his son with the apparent possession and ownership of the property, so that he was in a position to obtain credit upon the faith that he was the real owner; whether the son, with the knowledge or consent of the plaintiff, held himself out as the real owner, and was thereby enabled to contract the debt upon which the attachment issued; or whether the credit was given on the faith that he was such owner. The jury were instructed as follows: "Although the son may have claimed and held himself out to the world as the owner of the property, yet, unless the plaintiff knew of such conduct on the part of the son, and sanctioned or permitted it, so as to mislead or deceive those dealing with the son, he cannot be defeated in his recovery; but if the plaintiff knew that the son claimed to be the owner of the property in dispute, and permitted him to manage and deal with the property as his own, and the debt was contracted on the faith of such conduct and acts of the plaintiff, then the plaintiff is estopped to assert his ownership of the property in dispute, and you will say he is not the owner of such property, and your verdict will be for the defendant."

It is not here determined whether this is a correct statement of the law; but, assuming it to be so in a case to which it is applicable, we think it should not have been given in this case. We find no testimony upon which the jury could properly have found either that the plaintiff knew his son was holding himself out as the owner of the property for the purpose of obtaining credit, or that the debt specified in the attachment was contracted on the faith that he was such owner. The plaintiff did not know that his son was getting in debt until long after the debt specified in the attachment

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was contracted; and it does not appear that the creditor to whom it was contracted knew anything about the ownership of the property, apparent or actual, its condition, or the circumstances of his debtor.

The above instruction should not have been given, and on the undisputed evidence the plaintiff should have had a verdict. The judgment must be reversed, and the cause will be remanded for a new trial.

By the Court.— It is so ordered.

LANG, Appellant, vs. SIMMONS, Garnishee, etc., Respondent.

November 4—December 1, 1885.

VOLUNTARY ASSIGNMENT. *Preferences: "Wages of laborers, servants," etc.*

B. & B. operated a steam wood factory in which men were employed by them, and took contracts for all kinds of light wood work. L. & L. had a contract with them by which lumber furnished by L. & L. was sawed into strips and beaded by B. & B., and L. & L. were to pay them $15 per thousand feet for working up the lumber, and to make payments at the rate of $50 per month. In a voluntary assignment by L. & L., B. & B. were preferred as creditors for the amount due on such contract. *Held,* that B. & B. were not "laborers, servants, or employees" of L. & L., and the amount due them was not "wages," within the meaning of sec. 1, ch. 349, Laws of 1883, and the assignment was therefore void.

APPEAL from the Circuit Court for *Fond du Lac* County.

Garnishment. The facts are stated in the opinion. The issues were tried by the court, which found that the assignment to the garnishee was regular and valid. From a judgment accordingly, dismissing the garnishee proceedings, the plaintiff appealed.

For the appellant there was a brief by *Sutherland & Sutherland,* and oral argument by *Mr. D. D. Sutherland.*

Elihu Colman, for the respondent.

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TAYLOR, J. This is a garnishee action, in which *Simmons* is garnishee in the action of the appellant, *William Lang*, against D. C. Lang and J. H. Lang. The Langs were debtors of the appellant, and the garnishee claims to be the assignee of said debtors under a voluntary assignment made by the Langs before the garnishee action was commenced. The only question in the case is whether the assignment is void, under our statutes, as to the appellant, a creditor of the assignors at the time the assignment was made.

The learned counsel for the appellant urge that the assignment is void for three reasons: (1) That it is void under our laws, because it prefers one of the creditors of the assignors for a debt due from them which was not due for the wages of laborers, servants, or employees of the assignors. (2) That it is void because it conveys both the firm property and the individual property of the assignors, and directs the payment of all creditors equally. (3) The assignment is void for uncertainty because the schedule of creditors who were preferred as laborers, servants, and employees did not, when the assignment was made, and before the schedule was filed, state the sums due to each of them.

The facts in regard to the preferred creditors in the assignment, which the appellant claims render the assignment void, are as follows: Among the creditors preferred are Bates & Barrett, who are preferred for the sum of $150. The evidence shows that Bates & Barrett operate a sort of variety wood-works in Fond du Lac and take contracts for all kinds of light wood-work. They have a shop or factory run by steam-power, and have men at work for them in such shop or factory. The assignors had a contract with Bates & Barrett to do certain work for them. The assignors furnished hard-wood timber, which Bates & Barrett sawed into strips and beaded for the assignors; and the strips so prepared were used by the assignors in their business as trunk-makers. The arrangement between the assignors and

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Bates & Barrett was in substance this: Assignors furnished rough timber or planks, and Bates & Barrett were to saw and work up the timber according to the direction of the assignors. They were to pay Bates & Barrett $15 per thousand feet for working up the lumber; and they made payment to Bates & Barrett at the rate of $50 per month. When the assignment was made, the assignors were indebted to Bates & Barrett for work done under such an arrangement in the sum of $150. How long the debt had been accumulating was not made certain by the evidence. The counsel for appellant claim that the assignment is void because by its terms this debt of Bates & Barrett is a preferred debt.

Sec. 1, ch. 349, Laws of 1883, reads as follows: "Any and all assignments hereafter made for the benefit of creditors, which shall contain or give any preference to one creditor over another creditor, *except for the wages of laborers, servants, or employees, earned within six months prior thereto, shall be void.*" Sec. 2, ch. 48, Laws of 1885, reads as follows: "In every voluntary assignment hereafter made for the benefit of creditors, *the claims of all servants, clerks, or laborers for personal service or wages owing from the assignor for services or labor performed for three months preceding such assignment*, shall be preferred over the claims of all other creditors, and shall be paid first by the assignee after the payment of costs, debts due the United States or the state of Wisconsin, all taxes and assessments levied and unpaid, expenses of the assignment and executing the trust."

It will be seen by reading these two sections of our laws that it is the policy of this state to prevent all preferences in the payment of debts due from the assignors in case of an assignment for the benefit of creditors, except that in the act of 1883 a preference may be declared by the assignor in favor of money due for "the wages of laborers, servants, or employees earned within six months previous to the

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making of the assignment;" and the law of 1885, without any declaration on the part of the assignor, makes the claims of all servants, clerks, or laborers for personal service or labor performed for the assignors within three months preceding the assignment, preferred claims, to be paid in preference to all others except those mentioned in said last-named act. The assignment in this case was made before the enactment of the law of 1885, above quoted, and it is only quoted to show the policy of the legislature in protecting and preferring the claims of laborers, servants, and employees of persons making assignments.

It is claimed that, notwithstanding the act of 1883 declares the assignment shall be void if any preference is declared thereby except as permitted by said act, the ends of justice would be promoted by simply declaring the preference illegal and void, and upholding the assignment notwithstanding the illegal preference. It may be that it would have been better had the legislature so declared, and that such a declaration would have better promoted the ends of justice; but the fact remains that the legislature has declared that the assignment shall be void, and not the provision of the assignment giving the preference. We can do nothing but see that the law is executed as enacted; and if the claim of Bates & Barrett preferred in this assignment is not a claim for wages within the meaning of said sec. 1, ch. 349, Laws of 1883, then the assignment must be held void by this court, as the legislature says it shall be held void in such case. Whether the act of 1885, which, without the will or declaration of the assignor, prefers the claims of laborers, etc., earned within three months previous to the assignment, repeals the provisions of the act of 1883 which allows the assignor to prefer like claims earned within six months previous to the assignment, is a question not raised by the facts presented in this case as stated above. This assignment was made before the act of 1885 took effect.

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The material questions are, Were Bates & Barrett laborers, servants, or employees of the assignors? and Was the money due them for wages as such laborers, servants, or employees of the assignors earned within six months previous to making the assignment? We think these questions must be answered in the negative. The money due from the assignors to Bates & Barrett was not for "wages," within the ordinary meaning of that word as defined by the lexicographers. Webster defines the word "wages" as "a compensation given to a hired person for his or her services." In the Imperial Dictionary it is defined as follows: "In ordinary language the term 'wages' is usually restricted to sums paid as rewards to artisans, to domestic servants, to laborers employed in manufactures, in agriculture, mines, and other manual occupations." Worcester says: "In ordinary language the term 'wages' is usually employed to designate the sums paid to persons hired to perform manual labor." It is very clear that the money due from the assignors to Bates & Barrett was not due for "wages," within the definition of the word above given. They were not persons hired by the assignors to do manual labor for them, nor were they hired persons within the ordinary sense of the words "hired persons." They were manufacturers, doing business for themselves, and employing other persons, as well as machinery, to accomplish the work they contracted to do for others. The compensation they received for the work done by them was not so much for the manual labor performed by them or their servants as it was for the use of the machinery by which the work was accomplished.

Neither were Bates & Barrett the servants, laborers, or employees of the assignors within the ordinary meaning of these terms. Webster defines the word "servant" as "a person who is employed by another for menial offices or for other labor, and is subject to his command; a person who labors or exerts himself for the benefit of another, his master

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or employer; a subordinate helper." In the Imperial Dictionary the word "servant" is defined as "a person that attends another for the purpose of performing menial offices for hire, or who is employed by another for such offices or other labor, and is subject to his command. The word is correlative to master." Worcester says "servant" is "one who serves; correlative of master." Bates & Barrett were in no sense servants of the assignors in doing the work they did. They were contractors, and they had the entire control of the work to be done, and were in no way subject to the control or direction of the assignors while performing the work they contracted to do for them. Nor were they laborers or employees of the assignors in the sense that they were earning wages of such assignors for the work to be done by them. We think it very clear that servants, laborers, or employees who can be said to earn wages of an employer must hold such a relation to the employer that he can direct and control them in and about the work which they are doing for him. As said above in this case, Bates & Barrett held no such relation to the assignors while performing their contract with them, and the money due them for the work performed was not wages earned within the meaning of the statute.

This statute was lately considered by the district court of the United States for the eastern district of this state in the case of *Campfield v. Lang*, 25 Fed. Rep. 128, and in a very clear and concise argument the learned district judge reached the same conclusion as we have in the case at bar. The following cases cited by the learned counsel for the appellant sustain the conclusion we have reached in this case: *Heebner v. Chave*, 5 Pa. St. 115; *Peck v. Miller*, 39 Mich. 594; *Dean v. De Wolf*, 16 Hun, 186; *Hill v. Spencer*, 61 N. Y. 274; *Pennsylvania & D. R. Co. v. Leuffer*, 84 Pa. St. 168; *Smith v. Brooke*, 49 Pa. St. 147; *Sullivan's Appeal*, 77 Pa. St. 107; *Gravatt v. State*, 25 Ohio St. 162; *Wells v.*

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Southern Minn. R. Co. 1 Fed. Rep. 270; *State ex rel. Peck v. Rusk*, 55 Wis. 465.

The assignors having in their assignment preferred a debt due to one of their creditors contrary to the provisions of sec. 1, ch. 349, Laws of 1883, the assignment is void and the assignee had no title to the property described in such assignment, or the money derived from the sale thereof, as against a creditor of the assignors.

The other exceptions taken to the assignment need not be considered, as the one first taken is fatal to it and entitles the appellant to a judgment against the garnishee.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment in accordance with this opinion.

THOMPSON and another, Respondents, vs. THE WESTERN UNION TELEGRAPH COMPANY, Appellant.

November 5 — December 1, 1885.

Telegraph companies: Limiting liability: Negligence: Loss of sale: Damages.

1. A stipulation upon a telegraph blank that the company will not be liable for mistakes or delays in the transmission or delivery of any *unrepeated* message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, is void so far as it attempts to limit the liability for a want of ordinary care and diligence.
2. The following telegram was delayed in transmission by negligence of the defendant's servants: "Send bay horse to-day. Mock loads to-night." Mock was a well known buyer who was in the habit of shipping horses from the vicinity of the place from which the message was sent, and presumably the defendant's agent there knew that fact. The delay caused the sender of the message to lose the sale of the horse. *Held*, that the company was liable for actual damages.

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APPEAL from the Circuit Court for *Grant* County.

The case is stated in the opinion.

For the appellant there was a brief by *Brooks & Dutcher*, and oral argument by *Mr. Brooks*. They contended, *inter alia*, that a stipulation limiting the liability of a telegraph company is valid when gross negligence or fraud is not shown. *Heimann v. W. U. Tel. Co.* 57 Wis. 562; *Young v. W. U. Tel. Co.* 65 N. Y. 163; *Clement v. W. U. Tel. Co.* 137 Mass. 463; *Grinnell v. W. U. Tel. Co.* 113 id. 299. The rule applicable to common carriers applies with equal force to telegraph companies. *Boorman v. Am. Exp. Co.* 21 Wis. 152; *Bank of Ky. v. Adams Exp. Co.* 93 U. S. 188; *Hill v. S. B. & N. Y. R. Co.* 73 N. Y. 351; 2 Wait's Act. & Def. 40. Telegraph companies should not even be held to so strict a liability as carriers. *Ellis v. Am. Tel. Co.* 13 Allen, 226. The company was not liable in this case beyond the amount received by it. The agent was not informed of the importance of the message or that special damage would result from delay. *Baldwin v. U. S. Tel. Co.* 45 N. Y. 744; *Dorgan v. Telegraph Co.* 1 Am. L. T. R. (N. S.), 407; *Candee v. W. U. Tel. Co.* 35 Wis. 471; *Behm v. W. U. Tel. Co.* 8 Biss. 131; *Hord v. W. U. Tel. Co.* Cin. Law Bull. Feb. 1878, p. 147.

For the respondents there was a brief by *Wilson & Provis*, and oral argument by *Mr. Provis*.

TAYLOR, J. The respondents brought their action in justice's court against the appellant company to recover damages of the company for negligently delaying the transmission and delivery of the following telegram, delivered by the plaintiffs to the agent of the appellant at Boscobel, in this state, viz.:

"BOSCOBEL, April 26, 1884.

"*To E. G. Thompson, Fennimore, Wis.:* Send bay horse to-day. Mock loads to-night.

[Signed] "WILLIAM THOMPSON."

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This message was delivered to the agent of the company at Boscobel at ten A. M., on the 26th of April, 1884, and was not delivered at Fennimore until about ten A. M. on the 28th of April, 1884. The distance between Boscobel and Fennimore is about twelve miles. The company has a telegraph line between the two places. To send the message over the lines it would go first to Milwaukee and from there to Fennimore. The agent of the company at Fennimore says he received the message at ten o'clock A. M. on the 28th, and delivered it to the person to whom it was sent in three minutes after it was received. The usual time for sending a dispatch from Milwaukee to Fennimore is about twenty minutes. It was also stated by the operator at Boscobel that he sent the message to Milwaukee as soon as it was received by him from the plaintiff. The delay was between Milwaukee and Fennimore. The 26th of April, 1884, was Saturday.

The respondents recovered in justice's court, and the company appealed to the circuit court. A trial was had in that court, and the respondents recovered a verdict for $25 damages, for which they had judgment, and the company appeals to this court. Upon the argument in this court, the counsel for the appellant insists that upon the proofs the plaintiff was entitled to recover only the money paid for sending the message, and, as that had been tendered after the action was commenced, together with the costs of the action up to the time of the tender, the judgment should have been in favor of the appellant. This proposition, it is insisted, should be sustained upon two grounds: (1) Because such was the contract between the parties at the time the message was sent; and, (2) upon the facts proved and under the complaint, such is the extent of the damages the plaintiff is entitled to recover against the appellant in this action.

The telegram was written upon one of the blanks of the company, and the plaintiff admits that he knew the con-

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tents of said blank when he sent the message. The following is printed on such blanks, viz.:

"All messages taken by this company are subject to the following terms: To guard against mistakes or delays the sender of a message should order it *repeated;* that is, telegraphed back to the originating office for comparison. For this one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any *unrepeated* message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any *repeated* message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination.

"Correctness in the transmission of messages to any point on the lines of this company can be *insured* by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing."

It is not alleged in the complaint, nor proved upon the trial, that any reason was given by the plaintiff to the agent at Boscobel for sending the message, except what appears on the face of it; but he testifies that he told the agent to "hurry it up."

It is insisted that, according to the terms of the contract

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signed by the plaintiff when he sent his message, the company is relieved from all liability to respond in damages to the plaintiff for any neglect or delay in forwarding or delivering the message, beyond the repayment of the money paid to the company for sending the same. Whatever may be the decisions of other courts in other states upon this question, we think the decisions of this court settle the question against the appellant. *Candee v. W. U. Tel. Co.* 34 Wis. 471; *Hibbard v. W. U. Tel. Co.* 33 Wis. 558, 568. In these cases the telegrams were sent as night dispatches, upon printed blanks of the company by the terms of which such messages were sent at half the usual rates for day messages, "on condition that the company should *not be liable for errors or delays in the transmission or delivery, or non-delivery, of such messages, from whatever cause occurring*, and should only be bound in such cases to return the amount paid by the sender." In both cases it was held that the contract was void as against public policy so far as it undertakes to protect the company from liability for the negligence or fraud of its agents. In the last case cited the present chief justice says, quoting from the opinion in *Baldwin v. U. S. Tel. Co.* 45 N. Y. 751: "While telegraph companies are not insurers and do not guarantee the delivery of all messages with entire accuracy and against all contingencies, they do undertake for ordinary care and vigilance in the performance of their duties, and to answer for the neglect and omission of duty of their servants and agents;" "and this degree of liability the law imposes upon them, as well in the transmission and delivery of a night as of a day dispatch." Chief Justice DIXON, in the *Candee Case*, says: "Either the company enters into a contract with him (the sender of the message), and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason, and what all must assume to be the intention of the

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parties, to say that no contract whatever is made between them; and nobody, not even the officers or representatives of the company, asserts such a doctrine. It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whosoever comes and pays the consideration itself has fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists on the part of the company to transmit the message with reasonable care and diligence, according to the request of the sender."

We are quite satisfied with the decisions of this court above cited, and with the reasons given to sustain them, and we believe they are in accord with the weight of authority in other courts. See *U. S. Tel. Co. v. Gildersleve*, 29 Md. 248; *Baldwin v. U. S. Tel. Co.* 45 N. Y. 744; *Breese v. U. S. Tel. Co.* 48 N. Y. 140; *Bartlett v. W. U. Tel. Co.* 62 Me. 209; *New York & W. P. Tel. Co. v. Dryburg*, 35 Pa. St. 298; *Telegraph Co. v. Griswold*, 37 Ohio St. 301; *W. U. Tel. Co. v. Fenton*, 52 Ind. 1; *Abraham v. W. U. Tel. Co.* 23 Fed. Rep. 315; *Express Co. v. Caldwell*, 21 Wall. 269; *Parks v. Alta Cal. Tel. Co.* 13 Cal. 422; *White v. W. U. Tel. Co.* 14 Fed. Rep. 710, 718; *True v. International Tel. Co.* 60 Me. 9; *Wann v. W. U. Tel. Co.* 37 Mo. 482.

In holding that the telegraph company was liable to the plaintiff upon the facts proved in this case, we do not wish to be understood as holding that the company, under the agreement in question, would be liable for a mere mistake as to the accuracy of the message sent, or in its delivery, which might occur in the transmission or delivery notwithstanding the exercise of ordinary care on the part of the company, its agents, and servants. The evidence in this case shows a want of ordinary care and diligence in the transmission and delivery of the message when unexplained, and not a mere mistake which might occur consistently

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with the exercise of ordinary care. The learned circuit judge did not err in charging the jury that "it was the duty of the defendant company to transmit the message with reasonable care and diligence, and, in so far as the contract at the head of the message blank undertakes to limit or change this liability, it is void."

The only other question in the case is whether the plaintiff, upon the facts proved, was entitled to recover more than nominal damages. It seems to us that the telegram itself informed the agent of the company that it was of importance that the horse mentioned therein should be sent to Boscobel immediately on receipt of the telegram, so that he would arrive there before Mock would load his horses that evening. It was shown on the trial that Mock was a well-known purchaser of horses in that vicinity, and was in the habit of shipping horses purchased from that place to Milwaukee; and, in the absence of evidence to the contrary, it may be presumed that the agent of the company knew that fact. The telegram fairly conveyed the idea to the agent that this horse was wanted on that day at Boscobel for the purpose of sale to Mock. This was indicated by the words in the telegram, "Mock loads to-night." The evidence clearly tended to show that the plaintiffs lost the sale of the horse to Mock by reason of the delay in transmitting the message, and that the loss of such sale was a damage to them of $25, which was the amount they recovered.

We think the case was correctly decided at the circuit, and there are no errors in the record which should cause a reversal of the judgment. This decision, as well as the two above quoted made by this court, are in accord with the policy of this state as evidenced by the enactment of ch. 171, Laws of 1885. This chapter expressly declares that all telegraph companies doing business in this state shall be liable "for all damages occasioned by failure or negligence

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of their operators, servants, or employees in receiving, copying, transmitting, or delivering dispatches or messages."

By the Court.— The judgment of the circuit court is affirmed.

See note to this case in 25 N. W. Rep. 792.— REP.

MOORE, Appellant, vs. ROBERTS, Respondent.

November 5 — December 1, 1885.

HIGHWAYS. *(1, 2) To lands excluded therefrom: Connection with other highways. (3) Non-user or abandonment of part of highway. (4) Acceptance of damages for laying out: Estoppel.*

1. The order for laying out a highway under sec. 1275, R. S., need not state that it connects with another highway.
2. If it be proved that a highway laid out under sec. 1275, R. S., connects with a commonly used and traveled highway, it need not be further shown in order to sustain the validity of the former, that the latter is a *legal* highway.
3. Although only a portion of a highway has been continuously used, the other part does not for that reason cease to be a highway.
4. Acceptance of the damages assessed for the laying out of a highway over his land will estop the owner and those claiming under him from denying the legal existence of such highway.

APPEAL from the Circuit Court for *Grant* County.

The case is stated in the opinion.

For the appellant there was a brief by *Clark & Mills*, and oral argument by *Mr. Mills*.

For the respondent there was a brief by *Orr & Lowry* and *Bushnell & Watkins*, and oral argument by *Mr. Bushnell*.

ORTON, J. The appellant, the plaintiff in the circuit court, was the owner of the land west of the section line along which it was claimed a highway had been laid out three rods

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wide, and erected a fence on his side of said section line near the middle of said highway, and the defendant, as overseer of highways of that town, by order of the supervisors, removed said fence as an obstruction of the same, and the plaintiff brought this suit for damages against him on account of such removal, and after trial a verdict was found and judgment was rendered in favor of the defendant, from which judgment the plaintiff has appealed to this court. The defendant justified the removal of said fence by seeking to prove (1) that there was a legal highway along said section line; (2) that it had been used and worked as such; (3) that it had never been abandoned; and (4) that the plaintiff was estopped by his grantor receiving the damages to said land by reason of said highway, which had been awarded to him therefor. These were the questions in controversy.

The highway was sought to be laid out under sec. 1275, R. S., upon the affidavit of one Thaddeus Cobb, who owned land south of the southern terminus thereof, to connect said land with a highway at the northern terminus thereof. The affidavit was lost and was probably never filed with the records, but the defendant introduced the order of the supervisors of the town in which said highway was laid out, which duly recited the making of said affidavit, the giving the proper notices of the time and place of the meeting and hearing said application, their meeting then and there, and their decision to lay out said highway, and their order laying out the same. This order appears to be according to law, and, by sec. 1289, it is made presumptive evidence of the facts therein stated, and such facts were not attempted to be disproved. The only objection to said order was that the highway therein described is not stated therein to connect with a highway at its northern terminus, but it was proved by oral testimony that it did so connect with a commonly used and traveled highway. There is nothing

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in the statute that makes it necessary that such fact should be stated in the order. The highway is sufficiently described by its distance between two certain points on and along the section line. This is sufficiently certain in order to ascertain whether it does, in fact, connect with another highway.

It was further objected by the learned counsel of the plaintiff that such other highway should be proved to be a legal highway. If that were necessary to be proved to sustain such a highway, so that it shall not be a mere *cul-de-sac*, then it would be necessary further to prove that the highway with which it so connects, connects with another *legal* highway, and that with another, and so *ad infinitum*, for stopping anywhere would make a *cul-de-sac*, and such a highway must connect with another highway and not with a *cul-de-sac*. This would impose a very burdensome, if not an impossible, duty upon the town in order to maintain such a highway. The applicant who seeks to have such a highway laid out does so because "his lands are shut out from all public highways;" and if the highway with which he seeks connection is opened and used as a public highway, the purpose of the applicant, as well as of the statute, is satisfied. That is just what he seeks to do, and that is, to use such a highway in common with the public. For such purpose it must be presumed a highway, and it is very doubtful whether its legality can be called in question in a case involving only the legality of the highway laid out to connect with it; for that is really the only issue.

Secondly. The highway in question has been used and traveled when necessary all the time since it was laid out in 1873, and worked upon where necessary, according to the undisputed evidence in the case. When first laid out, there appears to have been a very poor and dilapidated fence along or near the section line and center of said highway, and that the travel sometimes was through and on the west

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side of it, and the part of the highway on the east side of said fence has been constantly used when necessary, ever since it was laid out, as the main traveled way out to and upon the highway with which it is connected at the north end. But the contention in respect to such user is that, inasmuch as the west half of such highway has not been used, at least that part of it has ceased to be a highway by non-user and abandonment. Upon the same ground all parts of any highway not actually traveled, or kept suitable for travel, would cease to be parts of such highway, and might be treated as abandoned. This would be placing highways on too narrow ground to be of much use to the public, and make them liable to abandonment by wilful encroachment. We think there was sufficient evidence that the highway has been worked and traveled as such when necessary, during all the time since it was laid out; and, *thirdly*, that there has been no abandonment of it by the public.

Fourthly. The testimony was that one Eastman, the grantor of the plaintiff, had his damages assessed for this highway at $15, and they were paid to him and accepted by him in full satisfaction thereof, and that he fully recognized said highway as lawfully laid out, and asked the privilege of his neighbors to leave some part of his fence therein for a short time only. This was a complete dedication of his land to the public for such highway, and it has been accepted as such, and the plaintiff, as the present owner of said land, is estopped to deny the legal existence of said highway. It was a complete dedication, and is an estoppel *in pais*. *Connehan v. Ford*, 9 Wis. 244; *Dubuque v. Maloney*, 9 Iowa, 455; *Karber v. Nellis*, 22 Wis. 215; *Schatz v. Pfeil*, 56 Wis. 429.

This disposes of all the questions raised by exceptions to evidence, instructions given to the jury, and to refusal to instruct as requested. The verdict of the jury was war-

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ranted by the evidence, and the motion for a new trial was properly overruled.

By the Court.—The judgment of the circuit court is affirmed.

THE UNITED STATES EXPRESS COMPANY, Appellant, vs. JENKINS, Respondent.

November 5 — December 1, 1885.

EVIDENCE: COURT AND JURY. *(1) Same evidence in criminal and civil action. (2) Circumstantial evidence: Misleading instructions.*

1. Though in a criminal action certain evidence was held sufficient to sustain a conviction for receiving stolen money, yet it does not necessarily follow that, upon substantially the same evidence in a civil action against the same defendant to recover the money, the court should direct a verdict for the plaintiff.
2. In an action for money had and received the evidence for the plaintiff was wholly circumstantial. The instructions to the jury separated the collateral facts shown and stated as to each that it was not sufficient of itself to warrant a verdict for the plaintiff, and also stated that, in order to recover, the plaintiff must show that the defendant actually took the money, or actually obtained and improperly kept that same identical money. The jury was not instructed as to the nature and effect of circumstantial evidence. *Held*, that the instructions given were misleading.

APPEAL from the Circuit Court for *Crawford* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This action is to recover moneys alleged to have been received by the defendant from the plaintiff, and which the former refused to pay over on demand. The answer was a general denial. The court gave no general charge, but did state to the jury the plaintiff's claim, and did give to them several instructions at the request of the defendant, to the

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effect that they must exclude from their minds "all reports, statements, and rumors . . . not in evidence;" that they must determine the facts from the evidence given in court; that they must find for the defendant unless it had been proven "that the defendant himself took" the money, or a part of it, from the plaintiff's safe, or obtained, and improperly kept it, or some part of it, after it was taken by somebody else; that "the possession of money not identified as the same, or a part of the same, money taken . . . raises no presumption whatever that it was that same money, or a part of it;" that "the sudden bettering of the defendant's circumstances, and his possession of more money than his neighbors generally supposed he had, if proven and wholly unexplained," were not sufficient to justify a verdict for the plaintiff, but was "a circumstance" for them to consider; that it was "not sufficient to entitle the plaintiff . . . to recover that it should prove that the defendant might have taken the money from its safe, or that he might have received it, or a part of it, from some person, or that he might have found it, or a part of it;" that "evidence that the defendant was poor before June 29, 1882, and had considerable sums of money afterwards, is not sufficient to justify" them "in finding against the defendant," but was a circumstance for them to consider. The court also gave to the jury this instruction, to which special exception is taken: "To entitle the plaintiff company to recover it must have proven here in court before you that the defendant *actually* did take that money from its safe, or that he *actually obtained and* improperly kept *that same identical* money, or some part of it. And *unless* the plaintiff company has so proven, you will find for the defendant."

Under these instructions the jury returned a special verdict to the effect (1) that after the arrival of the train of cars at Boscobel, 9:30 P. M., on the night of June 29, 1882, the plaintiff's employees left in its safe at that place $2,800;

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(2) that the same was stolen or embezzled therefrom on that night; (3) but that the defendant did not have or receive any part of it, *knowing* that it had been embezzled or stolen *from the plaintiff's safe;* and (4) the jury also returned a general verdict in favor of the defendant. From the judgment entered upon the verdict the plaintiff appeals.

For the appellant there was a brief by *Brooks & Dutcher*, and oral argument by *Mr. Brooks.*

For the respondent there was a brief by *Bushnell & Watkins*, and oral argument by *Mr. Bushnell.*

CASSODAY, J. The defendant was tried and convicted upon the charge of having received a portion of the money named, knowing that it had been stolen. He then brought that case to this court on writ of error, and urged a reversal in part upon the ground that the evidence was insufficient to support the verdict. The judgment was affirmed, and so it was held that the evidence was sufficient to sustain the conviction. *Jenkins v. State*, 62 Wis. 49. Counsel for the plaintiff seems to think that the opinion of Mr. Justice LYON in the criminal case required the trial court, upon similar evidence in this case, to direct a verdict for the plaintiff. This contention seems to be based upon a misconception of the functions of both court and jury. It was the province of the jury to pass upon the facts. They have done so. If there is no intervening error, the verdict will not be disturbed. The evidence in the record before us is quite similar to the evidence in the criminal case. Its nature and character are sufficiently indicated in the report of that case, to which reference is made. It is enough here to say that the evidence is wholly circumstantial. Such evidence generally presents to the jury the duty of balancing probabilities. In such cases the certitude of the verdict is rarely susceptible of demonstration.

As applied to such evidence we are convinced that the

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instructions given naturally tended to mislead the jury, especially the portion to which exception was taken. The fact that most of the instructions were prepared by and given at the request of the defendant's attorney did not render them any less likely to mislead. They gave the defendant's side of the case with repetition and emphasis, and only referred to the plaintiff's side by way of negativing certain portions of its evidence. True, the plaintiff's counsel were at liberty to present counter-instructions covering its side of the case, but they did not. Ordinarily, where the charge of the court does not cover all phases of the case, counsel is bound to call the attention of the court to the omitted portion by an appropriate request, or be precluded from making it available as error. But, even then, the instructions given must not tend to mislead the jury. In the case before us, under the instructions given, the jury might well have supposed that the plaintiff, in order to recover, was bound to prove before them in court by *direct* and *positive* testimony "that the defendant *actually* did take that money from its safe, or that he *actually* obtained and improperly kept that same *identical* money, or some part of it."

Since the evidence was all circumstantial, it is obvious that neither the act of taking, obtaining, keeping, nor identifying was proved by direct and positive testimony. A similar instruction had previously been given, but in a less objectionable form. "Circumstantial evidence is defined to be where the proof applies immediately to collateral facts supposed to have a connection, near or remote, with the fact in controversy." *Eberhardt v. Sanger*, 51 Wis. 78; *Bouck v. Enos*, 61 Wis. 663, 664. In such a case it is "obviously misleading to separate each collateral fact going to make up the chain of circumstances which would, together, thus force conviction of the principal fact in controversy, and then with qualification instruct the jury that such isolated

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collateral fact was not sufficient of itself to establish such principal fact." *Ibid.* Here that was done as to certain isolated collateral facts, without any instruction as to the nature or effect of circumstantial evidence, or whether the jury were at liberty to find for the plaintiff upon such circumstantial evidence. By thus entirely ignoring the plaintiff's case, based as it was wholly upon circumstantial evidence, except to weaken certain features of it, and then giving undue prominence to the fact of actually taking, actually obtaining, and improperly keeping that same identical money, it is easy to perceive how the jury may have been induced to believe that there was no such testimony in the case as would support a verdict for the plaintiff. It is very much as though the jury had been instructed that they must be so convinced beyond a reasonable doubt. Partial and one-sided instructions, tending to secure the result indicated, are certainly erroneous. Instructions to the jury should cover the whole case and take in all the testimony. *First Nat. Bank v. Currie*, 44 Mo. 91; *Ellis v. McPike*, 50 Mo. 574; *Raysdon v. Trumbo*, 52 Mo. 35; *Jones v. Jones*, 57 Mo. 138; *Calef v. Thomas*, 81 Ill. 479; *Chicago P. & P. Co. v. Tilton*, 87 Ill. 547.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

TIPPING and others, Appellants, vs. ROBBINS, Respondent.

November 6 — December 1, 1885.

MINES AND MINING. *(1) Lease to voluntary association: Rights of successor. (2) Revocation of license: Notice. (3) License by one tenant in common. (4) When license irrevocable although licensee has not entered. (5)* Res adjudicata: *Nonsuit.*

1. A voluntary association, of which the defendant was a member, having a mining lease of a certain tract of land, obtained a similar lease of the adjoining lot (now owned by the plaintiffs) in order to

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extend into the same a level which they were running upon the former tract. The defendant subsequently became the owner of the former tract and the association surrendered to him its rights therein, but the lease of the plaintiffs' lot was not assigned to him. *Held*, that the defendant acquired no right under said lease to extend the level upon the plaintiffs' lot and to dig and remove ore therefrom.

2. After the defendant became the owner of the first-mentioned tract one of the plaintiffs gave him an oral license to mine upon their lot. Afterwards a notice was posted upon said lot, notifying the association above mentioned, and all persons claiming under it, not to mine upon said lot under the lease to the association, because the same had been forfeited. After the posting of such notice the defendant continued for a long time, with the knowledge of the plaintiff who gave him the license, to run the level on his own lands towards the plaintiffs' lot, until finally he struck on the latter a valuable discovery. *Held*, that the notice posted was not a revocation of the license given to the defendant.
3. A license to mine upon lands given by one tenant in common will not bind the other tenants. [Whether such license is of any value without a further license from the other tenants in common, not considered.]
4. A license to mine upon lands is irrevocable under sec. 1647, R. S., after a valuable discovery or prospect has been struck by the licensee, even though he has not made an actual entry under the license.
5. After the commencement of an action to recover damages for the breaking and entering upon plaintiffs' land and the removal of lead ore therefrom by defendant who claimed to have acted under a license, the latter commenced an action against two of the plaintiffs and two other parties, in the nature of an action *quare clausum*, to determine the rights of the defendants therein to sink a shaft from the surface of said land to the opening below whence he was removing the ore through a drift on his own adjoining lands. The trial of the latter action was first had, and resulted in a nonsuit. *Held*, that the judgment in that action did not conclude either party as to the issues in the action first mentioned.

APPEAL from the Circuit Court for *Green* County.

The plaintiffs are *Irene Tipping* and *William Tipping*, minors, by William T. Fox their guardian *ad litem*, *Mary Jane Tipping*, and *William T. Fox*. The complaint alleges

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that they are the owners of a certain described tract of land; that in June, 1882, the defendant unlawfully and forcibly broke into and entered upon said land through a drift below the surface of the ground, and dug and removed therefrom large quantities of lead ore, to the damage of the plaintiffs in the sum of $4,000; that there was no communication with said drift from the plaintiffs' land and that the defendant refused to permit the plaintiffs to enter said diggings for any purpose; that the defendant has continued, and threatens to continue, to dig and carry away the ore from plaintiffs' land, and irreparable injury will result from his so doing. Judgment was asked for the damages aforesaid, and for an injunction, etc.

The answer set up a right in the defendant to mine upon the plaintiffs' land, both under a lease given to the Coon Branch Mining Level Company by the owners of said land, to the rights of which company the defendant claimed to have succeeded, and also under an oral license to the defendant from the plaintiff *William T. Fox*. The facts as found by the circuit court are as follows:

"1. That in the year 1882 the defendant, *James M. Robbins*, discovered on and in the lands of the plaintiffs the lead ore in controversy in this action and described in the pleadings herein; that the same was discovered in a crevice or range of lead ore, which was a valuable discovery as made by said defendant, *James M. Robbins*, on plaintiffs' land.

"2. From the evidence, as judged and construed by me, I find that the plaintiff *William T. Fox* verbally authorized the defendant to engage in and prosecute work for the purpose of trying to find mineral lead ore on plaintiffs' land, and did not revoke said authority or license until after the defendant had made a valuable discovery of lead ore on plaintiffs' said land, being the same land of plaintiffs' described in the complaint herein, which valuable discovery is

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the one from which the defendant took out the lead ore in controversy.

"3. I find that Lawrence Tipping, Jarman Tipping, and Mary Eliza Tipping, on the 7th day of September, 1874, were the owners of the tract of land upon which the defendant mined the lead ore in controversy herein, and on that day, together with one Thomas G. Stephens and one William Richards, who claimed some mining interest in said Tipping tract of land, executed a mining lease of said tract of land to an association of persons called the Coon Branch Mining Level Company, of which association the defendant was a member and contributor. That the consideration for executing said lease was that the lessees or their assigns should pay to the Tippings one eighth part of all the minerals and ores raised from the ground, and also, that the Coon Branch Mining Level Company should and did sell and assign to Lawrence Tipping, William Richards, and Thomas G. Stephens, the right in full, which the said Coon Branch Mining Level Company had acquired from one Emily Shaw by lease, to work a certain range of mineral, known as the Clymo range, situate on her land so leased. That the object of the association called the Coon Branch Mining Level Company, in procuring said lease from Tippings, Richards, and Stephens, was to prospect the land so leased by extending a level or adit that they were running towards and on the Tippings land; which adit or level was situated on the tract of land adjoining the Tipping tract, which the said association had leased from Emily Shaw; that subsequently, the defendant, *James M. Robbins*, became the owner in fee of the Emily Shaw tract of land, and all of the members of the association called the Coon Branch Mining Level Company, except the defendant, yielded up to the defendant the right to prosecute the level on the Emily Shaw tract, in the direction of the Tipping land, without making any formal assignment of the lease from the Tip-

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pings and Richards and Stephens. But I find that the defendant, as a member of the association, and as the successor of the association to the right to run the level on the Shaw tract towards the Tipping tract and on to the Tipping tract, prosecuted his level at great expense on the Shaw tract towards the Tipping tract until he got on to the tract leased by the Tippings and Richards and Stephens to the Coon Branch Mining Level Company, and made the discovery of minerals thereon, from which he took the ores in controversy. I find that the defendant, in prosecuting his levels, always claimed, under the Tippings, Richards, and Stephens lease, the right to mine the land covered by it according to its terms. I find that the lease executed by Lawrence Tipping, Jarman Tipping, Mary Eliza Tipping, T. G. Stephens, and William Richards was never canceled nor revoked. The amount of lead ore raised by defendant from plaintiffs' land is estimated at 100,000 pounds, but I find that it is all in the level, and the exact amount can be ascertained by weight.

"4. I find that the plaintiff *Wm. T. Fox* had notice of defendant's claim under the aforesaid lease, before and at the time he acquired an interest in the land.

"5. I do not find that the question of the right to mine upon plaintiffs' land by defendant as lessee, or as the discoverer of a valuable range, was ever necessarily involved in any previous litigation between the parties."

As conclusions of law the court found that the defendant had and has a legal right to dig and mine upon plaintiffs' lands the mineral in the crevice, opening or range by him discovered in running a level from his own land on to that of the plaintiffs; that he is entitled to the mineral taken by him from the plaintiffs' land, after paying to plaintiffs the one-eighth part thereof as rent; and that he is entitled to all the lead ore mineral found in said range, subject to the said rent.

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The court also found that the plaintiffs are not entitled to recover in this action, and that the defendant is entitled to his costs and disbursements and to such damages as he may prove to have sustained by reason of the injunction herein.

From the judgment entered accordingly the plaintiffs appealed.

For the appellants there was a brief by *Orton & Osborn*, and oral argument by *Mr. Orton.*

For the respondent there was a brief by *Cothren & Simpson*, and oral argument by *Mr. Cothren.*

COLE, C. J. The learned circuit court decided that the defendant made a valuable discovery of a crevice or range of lead ore upon the plaintiffs' land before his authority or license to mine upon the land was revoked. It is not entirely clear from the findings upon what ground the learned circuit judge based this authority or license. It is attempted, as we understand the argument of the learned counsel for the defendant, to sustain his right or license upon two distinct and independent grounds: (1) Through the Tipping lease given in September, 1874, to the Coon Branch Mining Level Company; and (2) by parol license given the defendant by the plaintiff *Fox.*

We do not see how the defendant acquired any rights from the first source; for, while the evidence shows that there was some talk between the defendant and different members of the Coon Branch association about assigning to him that lease, yet it was never in fact assigned. On the contrary, when the defendant prepared a written assignment of the lease and handed it to the president of the association to be executed, the president and other members refused to sign it. The assignment, as drawn, included both the Shaw lease and the Tipping lease, but the evidence is entirely clear and conclusive that no assignment was ever

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made. It is true, the defendant, after he purchased the Shaw tract in February, 1876, prosecuted mining quite extensively upon that land, but this he did as owner. Nor can we see the least reason for claiming that the defendant acquired some rights in the Tipping lease because he was one of the original members of the Coon Branch association; for, so far as the Shaw tract was concerned, the association surrendered its mining rights in that land. The proof is very explicit and satisfactory that when the defendant purchased this land he insisted that the association should either work it according to the terms of the Shaw lease, which they had not done, or surrender the land to him. A majority of the members of the association deemed it advisable to surrender it, and this was in effect done; so that whatever mining was done upon the land by the defendant after he purchased it was in his own right as owner, and not under any lease which had been theretofore given by his grantor. As he was the owner, all rights and title, legal and equitable, became absolutely vested in him. So upon this branch of the case we hold that the defendant can claim nothing under the Tipping lease.

The court below found that *Fox* verbally authorized the defendant to engage in and prosecute work for the purpose of trying to find lead ore on the plaintiffs' land, and that this authority or license was not revoked until after the defendant had made a valuable discovery on the land. We think whatever rights the defendant has to mine on the land must be derived from the parol license, supported by the statute. The evidence in regard to such parol license is quite contradictory. We shall go into no discussion of the testimony which makes for or against the fact. I will, however, say that the evidence to establish such license is not as clear and satisfactory to my mind as it seems to be to my brethren. Incontestably there is considerable tes-

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timony in the case which tends to show that *Fox*, as far as he had power so to do, gave the defendant verbal license to mine upon this land. Even in May, 1882, when the survey was made, he did not seriously object to the defendant's mining upon it if the latter would pay one sixth rent for all mineral taken out above the white bed-rock. It appears that *Fox* purchased an undivided one-third of the land of Mary E. Tipping in April, 1879, and another third of Lawrence Tipping in January, 1881. The other third belongs to the minors, *Irene* and *William Tipping*, subject to the dower interest of their mother. After a careful examination of all of the evidence our conclusion is that we cannot reverse the finding of the trial court on the ground that no parol license is established. There is no satisfactory preponderance of evidence against the finding on this point, except as to the infant plaintiffs; consequently, under our rule, we cannot set it aside.

As to the other undivided third owned by the infant plaintiffs there is no proof whatever that any license was ever given by any one which can affect them. Whether a general guardian could give a parol license in their behalf without an order of the county court, is a question not presented. But certainly a license by one tenant in common to prosecute mining on land would not bind a dissenting tenant. It is certainly a proper matter for the county court to determine whether the interests of the minors will be promoted by having mining done upon their land. The judgment, so far as it relates to the interests of the minors in the land, we deem erroneous. No parol license has been shown which can bind them. *Mr. Fox* might give a legal right to dig and mine upon the land so far as his interest was concerned. But this would not bind the infants. Whether the parol license given by *Fox* is of any value without the further license lawfully obtained of a guardian representing the infants, is a point we need not consider now.

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The able and ingenious counsel for the plaintiffs insists that there is no evidence whatever which justifies the conclusion that the defendant had a parol license from *Fox* to mine upon the land which, even as to him, was irrevocable under sec. 1647, R. S. That section, among other things, provides "that no license or lease, verbal or written, made to a miner, shall be revocable by the maker thereof, after a valuable discovery or prospect has been struck, unless the miner shall forfeit his right by negligence such as establishes a forfeiture according to mining usages." Counsel says that this provision does not mean that a mere license to enter upon land, and dig and remove mineral therefrom, while executory, and before an actual entry is made under it, is not revocable. The language, he claims, is not susceptible of such a construction; that the words used imply or presuppose the existence of a license to mine, an entry of the land under it, and the striking of a valuable discovery or prospect upon the very premises covered by the license. We do not think the statute should receive this strict construction, because, if so construed, it would certainly, in some cases, defeat the very object of its enactment. Counsel well says that at the time of the passage of this law an oral license to mine for lead ore was revocable by the maker even when executed, and where the miner had entered under it and made large outlays of labor and money, and had discovered mineral. In order, therefore, to remedy this state of things, and protect the miner, this statute was enacted. Now, if it should receive the construction for which counsel contends, the purpose of its enactment would in a measure be defeated. Take, for illustration, a case nearly like the one at bar in all essential points. A miner goes to A. and B., who own adjoining lots, and obtains a license from each to mine upon his land on payment of the usual rent. He goes to work on the land of A., expends much labor and money in sinking shafts and running levels, and finally strikes a

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mineral-bearing crevice near the line, which is absolutely certain to run into the land of B. Now, can the latter, in view of this statute, say to the miner just before this crevice is traced into his land: "I revoke the license which I gave you to mine upon my land. You have made no actual entry upon it thus far — have really done no mining upon it. You cannot have the benefit of any discovery you have made, nor remove any mineral which, by prosecuting your work, you would obtain from the range if you followed it upon my lot"? No one can fail to see the wrong and injustice which the land-owner would perpetrate if allowed to revoke his license under such circumstances. Yet this would be the result if, as counsel contends, the license is revocable until an actual entry is made upon the land to which it relates and a valuable discovery is made upon it. In this case the defendant had run his drift nearly to the line of the Tipping land. The crevice was an open one, bearing mineral, and persons crawled into the opening and actually found mineral in it on that lot. We have no doubt, under the circumstances, that the license came fully within the statute, and was irrevocable at this time, so far as *Fox's* interests are concerned.

But it is claimed that the license was revoked in August, 1880, if any had ever been given. There was a written notice put upon the Tipping lot, near the line, at that time, notifying the Coon Branch association, and all persons claiming under it, not to mine on that lot under the lease given in 1874, because that lease had been forfeited. The defendant undoubtedly saw this notice, but continued, for more than twenty months thereafter, drifting and running his level towards the Tipping land. It is not supposable that *Fox* was ignorant of these mining operations. If he intended to revoke any license which he had given the defendant to mine on the Tipping land, he should have notified the defendant personally of such revocation. The rules

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of frank, manly dealing required him to do this, in order that the defendant might be aware of his intention not to let him follow his level on the Tipping lot. So we are not inclined to treat the notice given as a revocation of any license which had been made to the defendant.

The only remaining question arises on the fifth finding. The circuit court found that the question of the right to mine upon the plaintiffs' land by the defendant, as lessee or as the discover of a valuable range, was not necessarily involved in any previous litigation between the parties. It appears that on the trial the plaintiffs offered in evidence the record in an action commenced, subsequent to this, by the defendant in this case against two of the present plaintiffs and two other parties. That suit seems to have been treated, both by counsel and court, as a legal action triable by a jury. On the trial of that action the court nonsuited the plaintiff. Now, it is said that that judgment, though in form a nonsuit, really involved the merits of the action so as to operate as an estoppel upon all issues in this. But we do not think this effect should be given to that adjudication. That action was between different parties, and the questions there litigated did not necessarily cover the grounds or issues embraced in this suit. That suit was in the nature of an action *quare clausum* to determine the right of the defendants there to sink a shaft from the surface of the ground to an opening below. The plaintiff was nonsuited, and the judgment therein given ought not to conclude the parties in this action from litigating the issues which are involved in the pleadings.

It follows from these views that the judgment of the circuit court must be reversed, for the reasons given, as to the rights of the infant plaintiffs, and the cause remanded for further proceedings according to law.

By the Court.— It is so ordered.

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ANDERSON and others, Appellants, vs. PATTERSON, Respondent.

November 6 — December 1, 1885.

Attachment: Fraudulent conveyance: Chattel mortgage.

A chattel mortgage given with the understanding, express or implied, that the mortgagor shall go on selling the property in the usual course of trade and applying the proceeds to his own use, is fraudulent as to his other creditors, and is ground for an attachment.

APPEAL from the Circuit Court for *Monroe* County.

The plaintiffs, who are partners, sued out a writ of attachment on a demand against the defendant, and caused his goods to be seized by virtue thereof. The affidavit annexed to the writ alleged, as grounds for the attachment, that the defendant had made a fraudulent disposition of his property, and that he fraudulently contracted the debt sued for. The defendant duly traversed such affidavit, and a trial of the issue resulted in a finding against the plaintiffs as to both of the alleged grounds, and an order dissolving the attachment was accordingly made. The plaintiffs appeal from such order. The testimony is sufficiently stated in the opinion.

The cause was submitted for the appellants on briefs by *Proctor & Tollefson*, attorneys, and *Cameron, Losey & Bunn*, of counsel, and for the respondent on the brief of *Dickinson & Graham.*

LYON, J. From some time in the year 1881 until January, 1885, when the attachment herein was issued, the defendant was a retail dealer in general merchandise at Melvina, in Monroe county. In March, 1882, he borrowed $200 of one Steele, and one Hunt became surety for the payment thereof. The debt to Steele not having been paid, the defendant, in June, 1884, executed a chattel mortgage to Hunt on his

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whole stock in trade, for the purpose of indemnifying the mortgagee against the obligation he had assumed to Steele. The mortgage contains the usual stipulation authorizing the mortgagee to take possession of the mortgaged property whenever he should deem himself insecure, etc. The defendant (the mortgagor) continued in possession of the property, and carried on the business as before. He used portions of the goods in his family, and sold other portions thereof. He applied the proceeds of such sales to the support of his family and in the purchase of other goods, from time to time, which he intermingled with the mortgaged stock. When the mortgage was executed there was no express understanding between the parties to it that the defendant might thus deal with the mortgaged property and the proceeds of the sales thereof. However, the mortgagee lived in the same place, was frequently in defendant's store, often saw him making sales of the mortgaged property, knew that he was thus replenishing his stock, and had all the means of knowing the manner in which he was disposing of the property. Yet he never interposed any objection thereto, but allowed the defendant to go on for seven months thus misappropriating the mortgaged property to his own use. In addition to these facts he testified that when he took the mortgage, his understanding was that the mortgagor should go on and sell the mortgaged goods in the usual way, and might do as he pleased with the proceeds thereof.

The conclusive inference from these facts is that there was an implied agreement or understanding between the parties, when the mortgage was executed, that the mortgagor might deal with the property as he did. Were such not the understanding, it is incredible that the mortgagee would have stood quietly by, and witnessed the misappropriation of the property and the consequent destruction of his security, without remonstrance or objection. Such

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agreement was a fraud upon the other creditors of the mortgagor — none the less so because it was implied rather than expressed — and invalidated the mortgage as against them. *Place v. Langworthy*, 13 Wis. 629; *Steinart v. Deuster*, 23 Wis. 136; *Blakeslee v. Rossman*, 43 Wis. 116; R. S. sec. 2306.

That the inevitable tendency and effect of a mortgage, fair and valid on its face, but void because of some extrinsic or secret infirmity, must be to hinder and delay the creditors of the mortgagor in the collection of their debts, is perfectly obvious, and the parties thereto cannot be heard to say that they did not intend that such effect should result from their actions. *Butts v. Peacock*, 23 Wis. 359. In *Place v. Langworthy*, 13 Wis. 629, the present chief justice said that such an agreement in a mortgage is directly calculated to hinder, delay, and defraud the creditors of the mortgagor, and is therefore necessarily injurious to them, and strictly within the statute of frauds. This is so, because the mortgage apparently places the property beyond the reach of such creditors, and drives them to a contest with the fraudulent mortgagee if they seek to enforce payment of their demands out of the property thus fraudulently disposed of or incumbered. When property is mortgaged to one creditor to secure his demand, good faith to other creditors of the mortgagor requires that if the same is sold, the proceeds shall be applied to the payment of the mortgage debt.

Our conclusion is, therefore, that by the execution of the mortgage to Hunt, the defendant conveyed or disposed of his property therein described with intent to defraud his creditors.

Counsel for defendant relied upon the case of *Fisk v. Harshaw*, 45 Wis. 665, claiming that in all material particulars it is like this case. But the claim is not well founded in fact. In that case a majority of the court were of the

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opinion that the evidence failed to show any agreement or understanding between the parties to the mortgage that the mortgagors might dispose of the goods, or the proceeds thereof, for their own use or benefit; or that the mortgagee knew of or assented to any such conversion thereof by the mortgagors, after the execution of the mortgage. The judgment sustaining the validity of the mortgage was based upon that view of the evidence. Mr. Justice TAYLOR dissented on the ground that, in his opinion, the evidence satisfactorily established such agreement or understanding, as well as the knowledge of the mortgagee that the mortgagors were converting the property, and the proceeds thereof, to their own use. In that view of the case, his dissenting opinion doubtless contains a correct statement of the law.

By the Court.—The order of the circuit court is reversed, and the cause will be remanded with directions to that court to sustain the attachment.

FIELD, Respondent, vs. DOYON, Appellant.

November 7—December 1, 1885.

Chattel mortgage: Sale by mortgagor: Acceptance of price by mortgagee: Estoppel.

If the mortgagee of personal property, with full knowledge that the same has been sold by the mortgagor for its full value, accepts the money realized from such sale and credits the amount on the mortgage debt, he is estopped from thereafter asserting any right to such property under the mortgage.

APPEAL from the Circuit Court for *Sauk* County.

The following statement of the case was prepared by Mr. Justice TAYLOR, as a part of the opinion:

This action was brought to recover the possession of two

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heifers two years old and three calves, of the alleged value of $80. The facts are as follows:

Louis Townsend was the owner of the heifers and calves; both plaintiff and defendant claim under him. Townsend on the 22d day of September, 1883, mortgaged the heifers and calves to the defendant, together with other personal property mentioned in the mortgage, to secure the payment to the defendant of the sum of $352.40 according to the conditions of a promissory note of that date, payable on demand, with interest at eight per cent. per annum. The mortgage was duly filed in the proper town clerk's office. On the 15th of February, 1884, Townsend, then still being in possession of the mortgaged property, sold the heifers and calves in question to the plaintiff for the sum of $55.50; also two pigs, $2; and one hog, $4,—making in all $61.50. Whether the pigs and hog were covered by the mortgage does not clearly appear. At all events the plaintiff does not claim them in this action, and it does not appear that the defendant claimed them under his mortgage.

On the 15th of February, the day of the sale of the property by Townsend to the plaintiff, Townsend wrote to the defendant a letter, of which the following is a copy:

"WONEWOC, February 15, 1884.

"*Mr. T. E. Doyon:* Please find inclosed $60 on my account. I have disposed of some of the property to raise the money, and I think I will be able to raise the rest before long. Hoping this will be satisfactory, I remain yours, with respect, L. TOWNSEND."

The defendant admits the receipt of this letter and the inclosed money. On receipt of this letter and money he wrote to Mr. Townsend to send him a description of the property sold, and on the 29th of February he received a reply giving a description of the property sold. The defendant indorsed the $60 on the note secured by the chattel mortgage.

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The letter sent by defendant, to which the letter of Townsend received on the 29th of February was a reply, was not produced in evidence and was lost. On the trial in the justice's court Mr. Townsend was a witness and undertook to state his recollection of its contents. After the trial in the justice's court, and before the trial on the appeal in the circuit court, Mr. Townsend died, and several witnesses were sworn on the last trial as to what the testimony of Mr. Townsend was in the justice's court as to the contents of the defendant's letter. This evidence tended strongly to show that in that letter the defendant stated that he wanted a description of the property sold so that he could release it from the mortgage.

The evidence shows that that plaintiff had no knowledge in fact of the existence of the chattel mortgage when he bought and paid for the cattle in controversy. It also tends very strongly to show that when the defendant claimed the property under his chattel mortgage notwithstanding he had received the purchase money, the plaintiff offered to surrender the property if the defendant would return the $60 received for the same, and that the defendant refused to return the money, or any part of it, and took possession of the cattle in controversy in this action and drove them away; and for such taking of the property this action was brought. The plaintiff had a verdict and judgment in his favor in the circuit court, from which an appeal was taken to this court.

G. Stevens, for the appellant.

W. S. Field, for the respondent.

TAYLOR, J. We think the evidence in the case fully sustains the contention of the respondent that the appellant, and defendant in the court below, with full knowledge that his mortgagor had sold the property in question to the respondent for its full value, accepted the money received on

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such sale by his mortgagor and credited the amount on his mortgage debt. And without showing the further fact that the appellant on the receipt of such money agreed to release the property so sold from his mortgage, it seems to us very clear that he is now estopped from asserting his right to the mortgaged property under his mortgage.

The argument of the learned counsel for the appellant, that the sale made by the mortgagor was not an illegal act, it seems to us can have no weight in the determination of this question. The sale in this case was not a sale of the mere equity of redemption, but was a sale of the things themselves for a full consideration, and such sale was a fraud in fact on the purchaser if the mortgagee is still to hold the property sold. The fact of such sale was known to the mortgagee when he secured the purchase money for the property so sold; and having received the money without objection, knowing of the fraud which would be perpetrated upon the purchaser if he should enforce his mortgage, equity and good conscience require that he shall either release his mortgage or return the purchaser's money. He cannot retain the money and hold the property under his mortgage.

The injustice of holding both the money and property is so apparent that it is unnecessary to cite authorities upon the point. It seems to us that the appellant does not stand in any different position than he would had he been present at the sale made by his mortgagor, without disclosing his mortgage, and had then received the purchase money immediately upon its being paid by the purchaser to his mortgagor. In that case even the learned counsel for the appellant admits that, after the acceptance of the purchase price, he could not enforce his mortgage against the purchaser. The fact that the sale was made without his knowledge at the time does not change the relations of the parties when he admits that he was immediately informed of the

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sale and accepted the money received from the purchaser. He is estopped from asserting his title in either case. Herman on Chat. Mortg. § 142, and cases cited. Bigelow on Estoppel (3d ed.), 579, says: "In like manner, if one, without actually inducing another to act in a particular way, assent to the thing done and seek to derive a benefit from it, he cannot, in case of disappointment, repudiate the validity of the act assented to." *Beall v. Barclay*, 10 B. Mon. 261, 264; *McConnell v. People*, 71 Ill. 481.

By the Court.—The judgment of the circuit court is affirmed.

SCHEIBE, Respondent, vs. KENNEDY, imp., Appellant.

November 7—December 1, 1885.

FORECLOSURE OF MORTGAGE. *(1, 2) Breach of condition by failure to pay interest: Terms of note imported into mortgage. (3) Prayer for excessive relief: Demurrer.*

1. A mortgage may be foreclosed for the breach of a condition thereof by failure to pay interest on the debt secured, although the mortgage itself does not provide for such foreclosure.
2. Where a mortgage is conditioned for the payment of a certain sum, with interest, "according to the tenor of" the note to secure which the mortgage was given, the terms of such note are imported into the mortgage, and a failure to pay interest as provided in the note is a breach of the condition.
3. In an action to foreclose a mortgage the complaint, if sufficient to maintain the action, is not demurrable because the relief demanded is greater than or different from that to which, upon the facts stated, the plaintiff is entitled. *Basse v. Gallegger*, 7 Wis. 442, distinguished.

APPEAL from the Circuit Court for *Waupaca* County.

The following statement of the case was prepared by Mr. Justice TAYLOR, as a part of the opinion:

This is an appeal from an order overruling a demurrer

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by the defendant to the complaint in the action. The action is brought to foreclose a mortgage upon real estate. The mortgage was given to secure the payment of a promissory note for $600, bearing date on the 6th of December, 1883, and payable on or before three years after the date thereof, with interest from date until paid at the rate of seven per cent. per annum, payable annually.

The condition of the mortgage, as set out in the complaint, is as follows: "That if the said mortgagors, their heirs, executors, administrators, or assigns, should well and truly pay, or cause to be paid, to the said mortgagee, his heirs, executors, or assigns, the said sum of six hundred dollars according to the tenor of said note, to secure which said mortgage was given as aforesaid, then the said note and the said mortgage should cease and be null and void."

The complaint set out two other conditions alleged to be contained in said mortgage, viz.: (1) It was expressly agreed that the mortgagors should not sell, convey, or dispose of said premises until the mortgage was fully paid and satisfied, and that in case they did so sell, etc., then said note should become due even at any time before maturity, and said mortgage may be foreclosed as though it were due. (2) An express agreement on the part of the mortgagors to keep the buildings on the mortgaged premises insured for the benefit of the mortgagee. The plaintiff does not, however, upon this appeal claim any benefit of this last condition, as he freely admits there is no sufficient breach of that condition set out in the complaint.

The complaint sets out a breach of the conditions, as follows: "That the mortgagors have failed to comply with the terms of said note and the condition of said mortgage by failing and neglecting to pay the sum of forty-two dollars, interest money for one year, which became due and payable on the 6th of December, 1884; . . . and by

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failing and neglecting to comply with the terms and conditions of said mortgage in selling, conveying, and disposing of said mortgaged premises without the consent of this plaintiff." The plaintiff demands judgment for the whole amount due the plaintiff on said note and mortgage, namely, for the sum of $600, with interest on said sum from the 6th day of December, 1883, with costs and disbursements and a reasonable and customary sum of money as solicitor's fee, as stipulated in the mortgage. The above statement of the allegations of the complaint is sufficient for understanding the objection made to the same by appellant on the hearing in this court.

P. V. Lawson, for the appellant.

For the respondent there was a brief by *F. M. Guernsey*, attorney, and *J. C. Gregory*, of counsel, and oral argument by *Mr. Gregory*.

TAYLOR, J. The learned counsel for the appellant insists (1) that, as the complaint demands a judgment of foreclosure and a sale of the mortgaged premises to pay the whole amount of the note and interest, with costs, etc., it should be held bad upon a general demurrer, if the facts set out in the complaint do not entitle the plaintiff to such judgment; (2) that the facts alleged do not make out a case for the judgment demanded; (3) that the plaintiff cannot maintain an action to foreclose this mortgage because of the nonpayment of the interest due on December 6, 1884. It was not claimed with much confidence on the part of the counsel for the respondent, upon the argument in this court, that the facts set out in the complaint were sufficient to entitle the plaintiff to a judgment of foreclosure for the whole amount of the note and interest to secure the payment of which the mortgage was given, and for the purposes of the decision of this appeal we shall assume that, upon the facts

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alleged, it is not made to appear that the whole amount of the note and interest was due according to the terms of the mortgage when the action was commenced.

The complaint, however, does allege that one year's interest on the note was due and unpaid when the action was commenced, and sets up that fact as a breach of the condition of the mortgage in the following language: "That said defendants [the mortgagors] have failed to comply with the terms of said note and the condition of said mortgage by failing and neglecting to pay the sum of forty-two dollars, interest money for one year, which became due and payable on the 6th day of December, 1884." This is an express allegation of a breach of one of the conditions of the mortgage by a failure to pay a part of the debt secured to be paid, and is sufficient in itself to authorize the commencement of an action to foreclose the mortgage, in the absence of some agreement in the mortgage which prohibits such foreclosure for that breach.

The rule is that the foreclosure of a mortgage may be commenced when any condition of the mortgage is broken by the nonpayment of any part of the debt secured thereby, when the same becomes due and remains unpaid. Coote on Mortg. 1018; *Holles v. Wyse*, 2 Vern. 290; *Gladwyn v. Hitchman*, id. 135; *Edwards v. Martin*, 25 Law J. Ch. 284; 5 Bac. Abr. 730, 731; *Bank v. Chester*, 11 Pa. St. 290; *Adams v. Essex*, 1 Bibb, 149; *Richards v. Holmes*, 18 How. 143, 146; *Ames v. Ames*, 5 Wis. 169; *Manning v. McClurg*, 14 Wis. 350. The statute of this state clearly contemplates the right of the mortgagee to foreclose his mortgage when any part of the debt secured becomes due and remains unpaid, and fully protects the rights of the mortgagor in such case by allowing him to bring into court the amount then due, with costs, and have the action dismissed, and after judgment all proceedings on the same may be stayed by bring-

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ing into court the amount due, with costs. R. S. 1878, secs. 3157, 3158. The only case cited by the learned counsel holding a contrary rule is *Brodribb v. Tibbets*, 58 Cal. 6. This case seems to have been decided upon the theory that, in order to allow the foreclosure of a mortgage for the non-payment of interest, there must be an express stipulation in the mortgage to that effect. No authorities are cited to sustain the ruling of the court, and we think it is wholly unsupported by the authorities.

In order to give a court of equity the right to maintain an action to foreclose a mortgage it is not necessary that the mortgage itself should provide for such foreclosure. The right to maintain the action, as stated above, arises out of the fact that the mortgagor has failed to perform the conditions of the mortgage by paying the debt secured thereby in the manner and at the time or times agreed upon in the mortgage. This must be so; otherwise the many decisions of this court which hold that an absolute deed, given in fact as security for the payment of a debt due from the grantor to the grantee, may and must be foreclosed as a mortgage, should be overruled; as, in such case, there is no provision in the deed, or even an agreement by parol, that, in case of the failure to pay the debt secured, the grantee in the deed may foreclose the same in equity. See *Walton v. Cody*, 1 Wis. 431, 433, and many other cases cited in the note to that case.

It must be deemed settled as the law of this court that, in the absence of an agreement to the contrary, a mortgagee may maintain an action to foreclose a mortgage when there is any breach of the condition of the mortgage by a neglect or refusal on the part of the mortgagor to pay the debt secured at the time or times when the same became due and payable.

If the complaint in the case at bar shows a breach of the

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condition of the mortgage in not paying the year's interest when due, then it states a good cause of action, and the demurrer was properly overruled.

It is claimed by the counsel for the appellant that, as the condition in the mortgage does not on its face show that the interest on the note secured thereby was payable annually, it does not appear that there has been any breach of the condition by the nonpayment of such annual interest. The condition as set out in the complaint is "that if the mortgagors, etc., should well and truly pay or cause to be paid to the said mortgagee, etc., the said sum of six hundred dollars, according to the tenor of said note, etc., then said mortgage should cease and be null and void." In the previous part of the complaint the note itself is set out, which shows that the interest thereon was payable annually at the rate of seven per cent. per annum. The allegations, taken together, show clearly that the condition of the mortgage was broken by the failure to pay the year's interest past due. If it were admitted that the condition of the mortgage was to pay $600, and the interest thereon according to the tenor of a note given by the mortgagor to the mortgagee bearing even date with the mortgage, such a condition would import the note into the mortgage for the purpose of determining what the exact condition was. In *Richards v. Holmes*, 18 How. 143, the court says: "It was argued that the trust deed does not describe the note as bearing interest, and consequently that the subsequent incumbrancer has a right to insist that, as against him, there was no power to sell for the nonpayment of such interest. It is true, the deed does not purport to describe the interest which is to become due on the note; but it clearly shows that it bore interest at some rate and payable at some time or times, and this was sufficient to put a subsequent incumbrancer on inquiry as to what the rate of interest and the time or times of its payment were. The deed in effect de-

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clares that its purpose is to secure the payment of such interest as has been reserved by the note, the amount and date and time of payment of which are mentioned. We do not think the mere omission to describe in the deed what that interest was to be, is a defect of which advantage can be taken by the defendants." The reasoning of the court in that case is quite satisfactory. If the condition of the mortgage in the case at bar does not show on its face that the interest on the note was payable annually, yet if it shows that the note was to draw interest, and the condition is to pay according to the tenor of the note, and the note itself shows that the interest is payable annually, then the condition of the mortgage is broken by the nonpayment of the interest when it becomes due, and the right to maintain an action of foreclosure is perfect.

But it is further insisted by the learned counsel for the appellant, because the plaintiff attempted to set out in his complaint other breaches of the conditions of the mortgage, which, if perfectly set out, would have shown that the whole amount of said note, including the interest, was due and payable at the time of the commencement of the action, and having asked judgment for the foreclosure of the mortgage for the whole amount of the note, including the interest, the complaint ought to be held bad upon a general demurrer unless the facts alleged show that the plaintiff is entitled to foreclosure for the whole amount. The counsel for the appellant relies upon the case of *Basse v. Gallegger*, 7 Wis. 442, as sustaining his objection to the complaint in this case. By an examination of the case of *Basse v. Gallegger* it will be found that, although there had been a demurrer to the complaint because it did not state a cause of action, the demurrer had been overruled by the court below, and a final judgment rendered foreclosing the mortgage for the whole sum due and ordering a sale of the mortgaged premises for the payment of the whole amount

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of the secured debt. The appeal was from the final order for the foreclosure and sale. On the hearing in this court it was held that the facts alleged in the complaint and the proofs in the case failed to show that any part of the principal of the secured debt was due. The judgment appealed from was necessarily erroneous, and was reversed. In the opinion the court say that the demurrer should have been sustained, notwithstanding the complaint showed upon its face that a portion of one year's interest remained unpaid when the suit was commenced. Although, as the case was presented to the court upon the appeal from the final order of foreclosure and sale for the whole amount of the secured debt, it was not, perhaps, absolutely necessary to a reversal of the judgment that the order overruling the demurrer should have been reversed, yet upon the allegations of the complaint in that case the demurrer did in fact fairly present the question as to the sufficiency of the complaint, for the reason that it was nowhere alleged in the complaint that the nonpayment of the interest was a breach of the condition of the mortgage upon which the plaintiff relied as a ground of his right to foreclose the same. The allegation that the interest remained unpaid in that case was not made for the purpose of showing a breach of the condition of the mortgage, but for the purpose of showing that the whole sum secured by the mortgage had become due because of the nonpayment of such interest, and then demanded judgment of foreclosure for the whole amount secured. As the court held that the plaintiff was mistaken in his claim that he could maintain an action to foreclose for the whole sum secured by the mortgage, and as that was in fact the only cause of action stated in his complaint, the demurrer was properly sustained.

In the case at bar the plaintiff has expressly alleged, as a breach of the condition of the mortgage, that one year's interest on the note was due and not paid when the action

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was commenced. This was not alleged as a fact upon which to base a claim that the whole sum secured by the mortgage was due, as was done in the case above cited, but as a substantive ground for the maintenance of his action. Had the plaintiff relied solely upon the breach of the conditions in the mortgage which would have entitled him to foreclosure for the whole sum secured, he might have omitted entirely the allegation of the breach of the condition as to the nonpayment of the interest, as will be seen by an examination of the conditions of the mortgage as set out in the complaint. The action being an action to foreclose a mortgage, and the facts alleged in the complaint being sufficient to maintain the action, it is not subject to a demurrer because the relief demanded in the prayer for judgment is greater or different than that to which the plaintiff is entitled upon the facts stated. *Ames v. Ames*, 5 Wis. 169; *State v. Smith*, 14 Wis. 565, 568; *Tewksbury v. Schulenberg*, 41 Wis. 584; *Moritz v. Splitt*, 55 Wis. 441; *Bronson v. Markey*, 35 Wis. 98.

The complaint clearly states facts constituting a cause of action for the foreclosure of the mortgage set out in the complaint, and the demurrer was therefore properly overruled.

By the Court.—The order of the circuit court is affirmed, and the cause is remanded for further proceedings.

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SPEARBRACKER, Respondent, vs. THE TOWN OF LARRABEE, Appellant.

November 7 — December 1, 1885.

HIGHWAYS AND BRIDGES: TOWNS: VILLAGES: NEGLIGENCE. *(1) Notice of injury: Alteration of date: Service: Evidence. (2) Notice of defects in bridge: Evidence. (3) When town liable for defects in bridge in village. (4) Voluntary repairs by village. (5) Presentation of claim. (6) Contributory negligence: Knowledge of defect.*

1. When a written notice under sec. 1339, R. S., was offered in evidence, the date January 11, 1884, appeared to have been erased and the date December 11, 1883, substituted. The plaintiff testified that he thought the alteration was made before the notice was served, and the evidence tended to show that such service was made December 11, 1883. *Held*, that the notice and the explanatory evidence were properly admitted. The time of service, not the date of the notice, was the material thing.
2. Evidence that a bridge was out of repair, and the planks old and decayed at other points than the one where an accident occurred, is admissible to show such a general defective condition of the bridge as would charge the town authorities with notice of its condition.
3. The town is liable for the damage happening by reason of the insufficiency or want of repair of a bridge in a village within its limits, unless such bridge is regulated by the provisions of a special village charter or is situated upon a street laid out in such village and not upon a town, county, or state road.
4. The fact that a village has occasionally made slight repairs upon a bridge which the town is bound to maintain, will not affect the liability of the town for an injury resulting from the defects or lack of repair thereof.
5. Subd. 2, sec. 821, R. S., as amended by ch. 118, Laws of 1882, refers only to accounts, and not to claims for damages arising *ex delicto*.
6. From the fact that the plaintiff knew of a defect in a bridge before driving thereon, it does not necessarily follow that he was negligent.

APPEAL from the Circuit Court for *Waupaca* County. The case is sufficiently stated in the opinion. There was

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a verdict and judgment for the plaintiff for $100 damages. The defendant appealed.

For the appellant there was a brief by *Gary, Phillips & Forward*, and oral argument by *Mr. Forward*.

For the respondent there was a brief by *F. M. Guernsey*, attorney, and *Gregory & Gregory*, of counsel, and oral argument by *Mr. J. C. Gregory*.

ORTON, J. This action was brought by the respondent to recover damages for injury to a horse, occasioned by the insufficiency and want of repair of a bridge upon one of the highways of the defendant town, and he recovered judgment therein, from which this appeal is taken. The facts in evidence will sufficiently appear in the consideration of the exceptions argued by the learned counsel of the appellant.

1. The admission in evidence of the written notice to the town required to be given by sec. 1339, R. S., ninety days after the happening of the event which caused the damage, as a condition precedent to maintaining the action. There were two such notices offered in evidence: one for the purpose of such notice as above required, and the other as the statement of the plaintiff's claim, filed with the town clerk, to be laid before the town board of audit, as required by sec. 824, R. S. These notices were alike, except it is claimed the first of said notices bore date January 11, 1884, and the other December 11, 1883. When offered, the date of the first notice, January 11, 1884, was erased, and the date December 11, 1883, was written. It was not conclusively proved that such alteration was made before its service on one of the supervisors of the town, but the plaintiff, as a witness, testified that he *thought* it was, and the testimony was sufficiently positive that the notice was served at the last-mentioned date. The date of the notice is quite immaterial, but it was necessary to prove the time when it

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was served. The accident occurred September 19, 1883, and January 11, 1884, would have been too late. The jury were warranted from the evidence in finding that the service was made in time, and most clearly the notices themselves, together with the explanatory evidence, were admissible to be considered by the jury, and their rejection by the court would have been erroneous.

2. The court refused to strike out the testimony that the bridge had many holes in it at other places than where the horse stepped through and was injured, and that the bridge was generally out of repair and the planks rotten and decayed, a few days before the accident. The refusal was based upon the ground that such condition of the bridge was pertinent to the question of notice to the town authorities of the defect which caused the injury. We think the testimony was proper with that view, because if the authorities had done their duty in repairing other places of defect of which they might be presumed, from their number and character, to have had notice, they would have probably discovered the defect in question. This defect was not such as to be dangerous except because the planks of the bridge were rotten and decayed underneath at the cracks or spaces where they came together. The space between the planks at this point, at the top or surface, was not wide enough to admit a horse's foot and leg, but by reason of the decay on their under side, when the horse's foot pressed upon the edges of the planks at this spot, they broke through and made a hole large enough for it to go through. This appeared to be the general defective condition of the bridge. The planks were laid lengthwise, and these cracks were the weak and defective places in consequence of such decay. This is what we understand from the evidence. It was generally a very bad and defective bridge and unsafe, and its condition was such that we think the town authorities should be held to have had notice of it, and of all such de-

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fective places, including the one in question. To the same effect was the evidence that an omnibus had broken through a similar place a short time before.

3. The circuit court refused to grant a nonsuit on the motion of the defendant based, *first*, upon the statutory liability of the village of Clintonville, in which said bridge is situated, or of the county of Waupaca, to keep the same in repair. This bridge was built by the defendant town, on a highway known as the New London and Shawano road, after the village was incorporated under the general law out of a portion of said town. There was no evidence that this highway had ever been adopted as a county road, so as to make the county liable to keep it, or the bridges thereon, in repair, or for damages occasioned by its not being kept in repair. Sec. 1339, R. S.; *Stilling v. Thorp*, 54 Wis. 528. The law controlling and fixing the liability to keep this bridge in repair is contained in sec. 910, R. S. This section is in the chapter entitled "Of Villages," which provides for their creation and incorporation "out of a part of any town," and first provides that the town shall not be liable to keep the streets and highways in such village in repair, etc., and then provides that "all bridges in such village shall be built, maintained, and repaired by the town in which the same is situated." This language would seem to be sufficiently explicit. But the learned counsel of the appellant contends that sec. 1339, R. S., which provides that "if any damage shall happen to any person, his horses," etc., "by reason of the insufficiency or want of repairs of any bridge," etc., "in any town, city, or *village*, the person sustaining any such damage shall have a right to sue for and recover the same against any such town, city, or *village*," conflicts with the above section, and, being subsequent in the revision, repeals that part relating to bridges in villages. It seem to us, however, that the village mentioned in this section is such as is incorporated by special charter, in

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which its streets, and bridges on the same, are regulated by special provisions, and not a village carved out "of any town or towns," and organized under the general law, in which and through which town and county highways had already been laid out, and on which bridges have been or ought to be constructed for the use of such highways. With this reasonable construction there is no conflict. This construction is approved and virtually enacted in sec. 2, ch. 178, Laws of 1883, which provides that "every such incorporated village or city shall have full power to control the building and repairing of all bridges in such village or city, *excepting upon town, county, and state roads*, and the expenses thereof," etc. It will be readily seen that this provision was necessary, not as an amendment, but to provide for building and repairing a class of bridges not before provided for, namely, bridges necessary to be built on streets laid out in such villages, and not on town, county, or state roads. This chapter is made specially to apply to "villages or cities *not existing under special charters*." It will be seen that neither of the above sections of the Revised Statutes provides for this class of bridges by the construction we have given to sec. 1339, and the exception in this new provision re-enacts and limits the above provision in sec. 910. "Town, county, and state roads," in the law of 1883, must mean such as were laid out before the villages were incorporated; for there is no right in towns or counties to lay out such roads through villages after their incorporation and becoming separate municipalities and having control of their own streets. *Jones v. Kolb*, 56 Wis. 263. The defendant town, probably under such a construction of the statute, built this bridge after the village was incorporated, and by the same legal duty it should have kept the same in repair, and is liable for damages occasioned by its want of repair. What the village did in making occasionally some slight repairs

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on the bridge was voluntary, and of course could not affect such legal duty and liability.

The *second* ground of the motion for a nonsuit, that the proper verified claim of the plaintiff was not filed with the clerk and board of audit according to ch. 113, Laws of 1882, was untenable, because this statute does not enlarge the class of claims embraced in sec. 821, R. S., and that section only refers to *accounts*, and not to a claim for damages arising *ex delicto*. *Jaquish v. Ithaca*, 36 Wis. 108.

Third. The plaintiff had knowledge of the defect before he drove on that part of the bridge. If he had such knowledge, still it was a question for the jury, whether he was negligent. *Cuthbert v. Appleton*, 24 Wis. 383; *Wheeler v. Westport*, 30 Wis. 392. But the extent of this particular hole or crack the plaintiff did not know, for its width on the surface was not large enough for a horse's foot to go through until it had been enlarged by its weight breaking through the decayed plank.

As to the instructions of the court to the jury: (1) The instruction that it was *undisputed* that the bridge was a part of the highway, and had been used as such *without any action of the village to adopt it* as a street, etc., was immaterial, whether correct or not, because the law fixes the liability of the town for this bridge on a town road, and there had been no municipal action on the part of the town or village to make this road into a street, so as to vacate it as a town road. The street superintendent of the village may have repaired some few places of defect a short time before the accident, but that, as we have said, was voluntary, and could not transfer the liability to keep the bridge in repair from the town to the village. (2) This instruction stated the law of the town's liability as we now hold, and was correct. (3) The instruction that the town was guilty of negligence was most clearly correct from the

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evidence. This bridge was and had been for a long time notoriously out of repair and dangerously defective, and if examined, as it should have been by the town authorities, this particular defect, and the decayed condition of the under side of the plank, would have been observed.

The instructions were very full, fair, and correct, and we think there was ample evidence to warrant the jury in finding for the plaintiff. The only possible apology for the town for such negligence in not keeping this bridge in repair is in the fact of there being some question as to whether it was the duty of the town or village to do so.

By the Court.— The judgment of the circuit court is affirmed.

WISCONSIN CENTRAL RAILROAD COMPANY, Respondent, vs. PRICE COUNTY and others, Appellants.

November 9 — December 1, 1885.

TAXATION: WISCONSIN CENTRAL RAILROAD LAND GRANT. *(1) Forfeiture by failure to complete road. (2) Lands within place limits when earned and taxable. (3) Indemnity lands: Approval of selection by implication: Withholding patents by reason of erroneous construction of judicial decision. (4) Taxes on land valid though not assessed to any one.*

1. Although the granting act required the completion of the road December 31, 1876, and the same was not completed until June, 1877, yet such delay worked no forfeiture of the grant, as there was no action by Congress or in any court, before such completion nor since, declaring such forfeiture.
2. By the location and completion of the road according to all the requirements of the granting act, the plaintiff secured an equitable right to all the lands granted to it; and, upon such completion, such equitable right at once attached to such of the granted lands as were situated within the place limits, including the eleven forties in question, and hence they were properly taxable in 1883.

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3. Those portions of the lands in question which were situated within the indemnity limits, having, prior to the assessment complained of, been duly selected by the proper party, and such selections duly certified to by the proper local United States land agents, and also by the governor of the state; and a list of the lands so selected and so certified having been presented to the secretary of the interior, and patents therefor requested; and all fees and charges thereon having been paid, or in effect tendered; and the secretary of the interior having refused to grant such patents on the sole ground that, upon his construction of a prior decision of the supreme court of the United States, the plaintiff had already received patents in excess of the lands granted, but which construction has recently been held by the same court to be unfounded; and there being no claim or pretense that such refusal was made on the ground that any of the lands in question were swamp lands, or lands to which the right of preemption or homestead had attached; or that any of them had been reserved for any other purpose, or sold or disposed of to any other corporation or person; or that any other party was making any claim to any of them; or that the secretary found any fault or made any objection to any of the selections so made and certified; or that there was any other ground for such refusal than the one stated,—it is *held* that such action and non-action of the secretary of the interior in the premises were equivalent to a recognition and acquiescence in the selections so made, certified, and presented to him, and, in effect, an approval and acceptance of the same by implication; and therefore, that the plaintiff's equitable right to the lands so selected, certified, presented, approved, and accepted, thereby specifically attached, and became certain in description, and hence that such lands were properly taxable in 1883.

4. The mere fact that the taxes in question were not assessed to the plaintiff by name, nor to "unknown," is not a valid reason for sustaining the judgment.

APPEAL from the Circuit Court for *Price* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This action was commenced April 10, 1884, to set aside the taxes levied and assessed on the lands described in the complaint in the year 1883, and to restrain the defendants from selling the same for the nonpayment of said taxes, on

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the ground that none of said lands were liable to taxation in that year, under the act of Congress of May 5, 1864, and the laws of this state. The answer, in effect, alleges that prior to January 1, 1880, the plaintiff had fully completed its railway, and fully earned the lands in question, and thereby became the equitable owner thereof, and entitled to patents therefor. The cause was tried, and February 12, 1885, the court found, in effect, as matters of fact:

1. That the lands described were all wild, unoccupied, and unimproved, and situated in the town of Worcester, in the defendant county, and were a portion of the lands granted to the state by the third section of the act of Congress of May 5, 1864, for the purpose of constructing what is now the plaintiff's railway.

2. That eleven forties of the lands described were situated within the ten-mile limits of said grant, and all the rest within the indemnity limits, and all in odd-numbered sections.

3. That all of said lands were assessed in said town in 1883, and put into the tax roll, and the amount of tax carried out against each respective piece as stated in the complaint, but were not assessed to the plaintiff by name, nor to any one else, nor to "unknown," and none of the real estate included in the assessment roll for that year was assessed to the owners thereof; that a warrant was attached to said tax roll, and the roll, with said warrant attached, placed in the hands of the town treasurer for collection; that the taxes were unpaid thereon, and the town treasurer returned the same to the county treasurer as delinquent.

4. That February 25, 1884, the plaintiff received a patent from the state of all said lands, and thereby acquired the absolute title in fee to the same; that until then the plaintiff got no title to the lands, and had no right to sell or convey

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the same; that until they were segregated and identified, and the grant applied thereto, the grant was a "float."

5. That the plaintiff's right to the lands was in dispute between the state and the United States; that said lands and others were withheld from the state and the plaintiff by the secretary of the interior, and consequently the issuing of patents therefor by the United States delayed; that the plaintiff did not in any manner delay the issuing of patents therefor, but, on the contrary, was diligent and persistent in its efforts to procure said patents from time to time; that the delay in their issue was caused entirely by the government of the United States and the general land office, against the protest of both the plaintiff and the state, and in spite of continued and unintermitted efforts made by both the plaintiff and state to obtain their issue by the interior department.

6. That the lands described had, at the time the taxes were levied and assessed thereon in 1883, been selected as lands to which said land grant applied, but said selections had not been approved by the secretary of the interior, and had not been certified to the state, and had not in any manner been identified as the lands upon which the plaintiff would eventually receive patents, but, on the contrary, the secretary of the interior had refused to recognize the right of the state to the lands, or to approve the selections so made.

7. That all the material allegations of the complaint were true.

As conclusions of law the court found, in effect:

1. That it was not the intent and meaning of the act of Congress that said lands should be subject to taxation until they had been earned by the plaintiff and patented by the United States; that while these lands had been in truth earned by the plaintiff before the lands were assessed for

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taxation, yet the plaintiff's right to the same and patents therefor had been denied by the secretary of the interior; that the plaintiff could not exercise control over them until it should be determined whether it was entitled to receive patents for them as part of the lands granted.

2. That said lands were a "float" as long as the plaintiff's right thereto was not admitted and recognized by the secretary of the interior, but denied and disputed by him, and patents therefor withheld by him against the will and request of the plaintiff; and hence during such time the lands were not subject to taxation by the state.

3. That said lands were not subject to taxation in 1883, and that the taxes levied and assessed thereon for that year were and are illegal and void, and should be set aside for the reason that said lands were exempt from taxation during that year.

4. That said tax was a cloud upon the plaintiff's title to said lands, and it was therefore entitled to prevail and to the relief prayed for in the complaint.

Upon such findings judgment in favor of the plaintiff, perpetually restraining the defendants from collecting said taxes, was entered, and from that judgment the defendants appeal.

For the appellant there were briefs by *Willis Hand*, *M. Barry*, and *A. R. Mead*, and oral argument by *Mr. Hand* and *Mr. Barry*.

For the respondent there was a brief by *D. S. Wegg* and *T. L. Kennan*, attorneys, and *E. H. Abbot*, of counsel, and oral argument by *Mr. Wegg* and *Mr. Kennan*. They contended, *inter alia*, that while patents were being withheld by the general government and the right to have the lands was denied, the lands were not subject to taxation. *Railway Co. v. McShane*, 22 Wall. 444; *Railway Co. v. Prescott*, 16 id. 603. The lands could not be taxed under state laws until the specific tracts had been by some act of the govern-

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ment segregated from the body of public lands and at least an equitable title thereto vested in the grantee. *Whitney v. Gunderson*, 31 Wis. 359. The government always claims for itself the privilege of determining what lands it has granted; and until that fact is so determined the lands would not be subject to taxation. *Schulenberg v. Harriman*, 21 Wall. 62. Indemnity lands remain a "float," notwithstanding the location of the railroad, until they are chosen at the instance and under the supervision of the secretary of the interior. *Missouri, K. & T. R. Co. v. Noyes*, 25 Kan. 340; *Atchison, T. & S. F. R. Co. v. Rockwood*, id. 292; *Grinnell v. Railroad Co.* 103 U. S. 742; *Cedar Rapids & M. R. Co. v. Herring*, 110 id. 38; *Ryan v. Railroad Co.* 99 id. 382. If the title to these lands at the time they were assessed was in the United States, or held by the state in trust for the United States, they were not liable to assessment and taxation, and the doctrine of relation does not apply. *Calder v. Keegan*, 30 Wis. 126; *Tucker v. Ferguson*, 22 Wall. 572. The land grant act provides that the company should have no right to sell and dispose of the lands until it received patents, and it had no right to receive patents until the selections were made and duly approved by the secretary of the interior. The state therefore had no right to tax the lands and sell them for taxes, because the state could not sell any greater interest in the lands than the railroad company had. If the United States had any interest or any right to withhold the title, it could not be deprived of that right by state legislation. See *Denniston v. Unknown Owners*, 29 Wis. 351. The state of Iowa had a similar land grant, and it was held by the supreme court of that state that the lands were not subject to taxation until the patent issued. *McGregor & M. R. Co. v. Brown*, 39 Iowa, 655; *Cedar Rapids & M. R. Co. v. Woodbury Co.* 29 id. 247. As long as the claim of the plaintiff to the lands was not recognized by the proper officers of the government,

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the lands could not be taxed. *Doe v. Iowa R. L. Co.* 54 Iowa, 657; *Cent. Pac. R. Co. v. Howard*, 52 Cal. 227; *Grant v. Iowa R. L. Co.* 54 Iowa, 673; *Dickerson v. Yetzer*, 53 id. 681; *Litchfield v. Webster Co.* 101 U. S. 773; *Iowa R. L. Co. v. Story Co.* 36 Iowa, 48; *Sioux City & St. P. R. Co. v. Osceola Co.* 50 id. 177.

CASSODAY, J. By the act of Congress of May 5, 1864, certain lands were granted to the state to aid in the building of three separate lines of railway. 13 Stats. at Large, 66, ch. 80. The third section granted lands to the state in aid of what is now the plaintiff's line of road. The language of the section is in effect "that there be and is hereby granted to the state of Wisconsin, for the purpose of aiding in the construction" of said line of road, "every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road. . . . But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of any sections or parts thereof, granted as aforesaid, or that the right of preemption or homestead has attached to the same, that it shall be lawful for any agent or agents of said state, appointed by the governor thereof, to select, subject to the approval of the secretary of the interior, from the lands of the United States, nearest to the tier of sections above specified, as much public land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of preemption or homestead has attached as aforesaid, which lands (thus selected in lieu, etc.) shall be held by said state, or by the company to which she may transfer the same, for the use and purposes aforesaid." Sec. 7 provided, in effect, "that whenever the companies to which this grant is made, or to which the same may be transferred, shall have com-

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pleted twenty consecutive miles of any portion of said railroads, . . . patents shall issue, conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: *provided*, however, that no patents shall issue for any of said lands unless there shall be presented to the secretary of the interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor, . . . that such twenty miles have been completed in the manner required by this act." Sec. 8 provided, in effect, "that the said lands hereby granted shall, when patented as provided in section seven of this act, be subject to the disposal of the companies respectively entitled thereto, for the purposes aforesaid, and no other." Sec. 9 provided, in effect, "that if said road . . . is not completed within ten years from the time of the passage of this act, as provided therein, no further patents shall be issued to said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States." That act was explained and enlarged by a resolution of Congress approved June 21, 1866. 14 U. S. Stats. at Large, 360. By an act of Congress approved April 9, 1874, the time for the completion of the road, without reversion, was extended to December 31, 1876. 18 Stats. at Large, 28, ch. 82.

It is undisputed that all the lands covered by sec. 3 of the act of Congress of May 5, 1864, were, by several acts of the legislature of this state, granted to the predecessors of the plaintiff and finally to the plaintiff, substantially upon the same terms and conditions named in the acts of Congress. Among the conditions so imposed by the state was one to the effect that the title to the lands should not vest in the company sooner or faster than the lands might be

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sold, as provided and declared in the aforesaid act of Congress; but declared, in effect, that the company should be capable in law of taking and holding any land so granted which should be conveyed to it by such grant, or deed, or *by the operation of law*, and might also mortgage, or pledge, or otherwise dispose of all their right, title, interest, or claim therein of which it might be seized at the time of the execution of such mortgage, or which it might acquire subsequently thereto. Secs. 8, 11, ch. 314, P. & L. Laws of 1866; secs. 9, 12, ch. 362, P. & L. Laws of 1866, as amended by ch. 6, Laws of 1875. By a subsequent act it was declared, in effect, that whenever any railroad company in this state, holding grants of land to aid in its construction, had or should finish its said railroad, or any section thereof, and the same should be certified to the secretary of the interior by the governor as completed in compliance with the several acts and resolutions of Congress and the acts of the legislature of this state, and lists of said lands should be certified by the secretary of the interior to the state for such company, the governor was thereby authorized and directed to convey the same by deeds to such company, which deeds, when so issued, should be *prima facie* evidence of title in all the courts, and inure to the benefit of the company, or its assigns, and all persons claiming under it. Ch. 381, Laws of 1876.

It is admitted that the plaintiff fully completed its road in compliance with all the requirements of the act of Congress and the legislature as early as in June, 1877. The mere fact that the road was not fully completed before December 31, 1876, did not work a forfeiture of the grant. That could only be done by direct action by Congress or direct proceedings in court for that purpose before such completion. *Schulenburg v. Harriman*, 21 Wall. 62–4; *Van Wyck v. Knevals*, 106 U. S. 368, 369. No such action has ever been taken by Congress, nor in any court. It is also

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admitted that a statement thereof, verified by the oath of the president of the company, and certified to by the governor, was upon such completion, and during the year 1877, presented to the secretary of the interior. It is also conceded, and virtually found by the court, that prior to 1880 the plaintiff had duly selected the lands claimed by it under the grant, including all the lands in question; that such selections had been duly certified to by the United States land agents of the respective districts where the lands were situated, and also by the governor of the state, and a list of the lands so selected and so certified, including all the lands in question, had been presented to the secretary of the interior, and patents therefor been requested, but that the secretary had refused to issue or allow such patents to be issued. It also appears from a letter addressed to the secretary of the interior under date of November 16, 1877, by the commissioner of the general land office at Washington, in the record before us, submitting list No. 8 of selections by the plaintiff for his approval, that it then appeared from the records in his office that out of the odd-numbered sections within the ten-mile limits of said road the United States had, prior to the passage of the land grant of May 5, 1864, disposed of 789,622 acres; and after the passage of the act, and prior to the definite location of the line, the United States had disposed of 161,695.53 acres more; that according to the practice of that office prior to the date of that letter the plaintiff was entitled to lands from the indemnity limits in lieu of those disposed of prior to the passage of the act, as well as those disposed of after the passage of the act; but that it appeared from the decision of the supreme court of the United States in the case of *Leavenworth, L. & G. R. Co. v. U. S.* 92 U. S. 733, then recently published, that such practice of that office had been erroneous, and that indemnity could only be allowed for lands sold or disposed of by the United States after the passage of the

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granting act; and that, applying that rule to the grant in question, the plaintiff had already received patents for 41,820 acres in excess of the indemnity authorized by the granting act.

In response to that letter, the secretary of the interior, under date of December 26, 1877, sanctions the commissioner's version of that decision, and quotes at length from the opinion of Mr. Justice DAVIS in behalf of the majority of the court in that case, and concludes by instructing the commissioner, by reason of that decision, not to issue any further patents to the plaintiff, and to call upon it to relinquish its claims to the lands so patented in excess of what it was entitled to under the grant by such construction. From the decision of the majority of the court in the case just cited Mr. Justice FIELD delivered a dissenting opinion, concurred in by Justices SWAYNE and STRONG. Such refusal of Mr. Schurz, the then secretary of the interior, to issue any further patents to the plaintiff or to the state, by reason of the construction thus given to the granting act, was frequently repeated and continued during his term of office; and the same ruling and construction were sanctioned and followed by his successor, Mr. Secretary Teller. None of these refusals were put upon any other ground than the one mentioned. There is no claim that any secretary of the interior ever refused to issue any of such patents by reason of any of the lands in question being swamp lands, or lands to which the right of preemption or homestead had attached, or that any of them had been reserved for any other purpose, or sold, or disposed of to any other corporation or person; or that any other party was making any claim to the lands, or any of them; or that there was any other ground for refusing such patents, except as stated. Such being the facts, we must conclude that neither of the secretaries found any fault with the selections made and certified; but, on the contrary, that they each recognized and

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acquiesced in such selections, and would have issued such patents but for the reasons given.

Since the decision of this case by the trial court, the supreme court of the United States has announced its decision in *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618. In that case the court was unanimous, and the opinion by Mr. Justice FIELD refers to the case of *Leavenworth, L. & G. R. Co. v. U. S., supra*, as follows: "The language (of Mr. Justice DAVIS) in *Leavenworth, L. & G. R. Co. v. U. S.* 92 U. S. 733, is quoted as sanctioning the position of the appellant. The court, speaking of the indemnity clause in the grant then under consideration, said its purpose was to give sections beyond the limits designated for those lost within it by the action of the government *between the date* of the grant and the *location* of the road. But it did not say that this was its only purpose; and if the *language must be construed* as meaning that, *it was a mere dictum*, not essential to the decision of the case. The question was, what lands could be taken for indemnity, not for what deficiencies indemnity could be had. And it was held that an Indian reservation did not pass by the grant, and could not be taken as indemnity for the lands otherwise lost from it. There was no question before the court for what deficiencies indemnity could be supplied." After giving the reasons for a different construction than the one intimated by Mr. Justice DAVIS, the learned justice said: "It follows that in our judgment the indemnity clause covers losses from the grant by reason of sales and the attachment of preemption rights *previous to the date of the act*, as well as by reason of sales and the attachment of preemption rights between that date and the final determination of the route of the road."

The language in the act of Congress thus construed by that court, which is the final arbiter of the question, is so nearly identical with the language in the act before us

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which we are now considering, that we feel bound by the decision as an authoritative exposition of the law on the subject. From this decision we are forced to the conclusion that each of the learned secretaries of the interior named refused to issue patents for the lands in question solely by reason of a misconception of what the supreme court of the United States had in fact decided some ten years ago in the case mentioned.

Did the mere fact of such refusal, based solely on such erroneous conception of the law, prevent the equitable title to the lands in question from becoming vested in the plaintiff so as to subject them to taxation? The language of the act of Congress was that of a present grant to the state, but with conditions, restrictions, and limitations preventing any title from being vested in the plaintiff, except on performance of such conditions, etc. *Schulenburg v. Harriman*, 21 Wall. 58, 62; *Tucker v. Ferguson*, 22 Wall. 571, 572; *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.* 97 U. S. 495, 496; *Railroad Co. v. Baldwin*, 103 U. S. 429. Upon the same terms it was granted to the plaintiff by the state. The grant operated as a law as well as a transfer of property to the state, and had such force as the intent of Congress required. *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.* 97 U. S. 497. After the definite location of the line of the road the equitable right to earn the undisposed of lands became fixed in the plaintiff, and no valid adverse right to any such lands in the place limits could be subsequently acquired. *Van Wyck v. Knevals*, 106 U. S. 360; *Walden v. Knevals*, 114 U. S. 373. Yet, while any of such lands remained unearned, the right of the plaintiff to the same was very much like the right of a vendee of specific lands in an executory contract. *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 641; *Walden v. Knevals, supra.*

The right of the plaintiff to lands earned, but situated in the indemnity limits, and not ascertained nor selected, was

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quite similar, but attached to no specified land. *Ryan v. Railroad Co.* 99 U. S. 382; *Cedar Rapids & M. R. Co. v. Herring*, 110 U. S. 38 *et seq.; Kansas Pac. R. Co. v. A., T. & S. F. R. Co.* 112 U. S. 414. But as to lands within the place limits, which had in fact been earned, and in respect to which all the requisite conditions had been fully complied with, such contract became executed so far as the plaintiff was concerned; and hence it thereby became invested with an equitable right to the lands. *West Wis. R. Co. v. Trempealeau Co.* 35 Wis. 258; *S. C.* affirmed, 93 U. S. 595; *Van Wyck v. Knevals*, 106 U. S. 360; *Grinnell v. Railroad Co.* 103 U. S. 742; *S. C.* 5 Am. & Eng. R. Cas. 447; *Litchfield v. Webster*, 101 U. S. 775; *Cedar Rapids & M. R. R. Co. v. Herring, supra; Walden v. Knevals, supra; Kansas Pac. R. Co. v. A., T. & S. F. R. Co. supra.* The same is true with respect to lands fully earned and duly selected from the indemnity limits, and properly certified to and sanctioned by the requisite state and national authorities. *Ibid.* As soon as the plaintiff had acquired such complete equitable right to any specific lands, the same could not be defeated by the land department at Washington issuing a patent therefor to some other party. *Van Wyck v. Knevals, supra; Walden v. Knevals, supra; Cedar Rapids & M. R. R. Co. v. Herring, supra.*

There can be no doubt but what the plaintiff, prior to 1880, acquired such complete equitable rights to the eleven forties in the place limits. The same is true in respect to the lands selected from the indemnity limits, and certified and presented to the secretary of the interior as stated, unless the mere refusal of the secretary to issue patents therefor on the ground mentioned prevented such equitable rights from vesting in the plaintiff. The requisite fees and charges of the local land offices and the department of the interior seem to have been paid or in effect tendered by the plaintiff. There is no doubt but what the selections were made by the

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party designated by the law. True, the act of Congress declared that the selections should be "subject to the approval of the secretary of the interior." No objection having been made by that officer to the selections certified and presented to him as stated, except on the ground mentioned, must be regarded as equivalent to an acceptance by him of such selections, since it now appears that the only objection made was unfounded, and that the plaintiff was then legally entitled to the lands. Thus, it has been held that the receipt of the map definitely fixing the line of a proposed railway in that department without objection, must be "considered as equivalent to its acceptance." 114 U. S. 375.

We are not aware of any decision of the supreme court of the United States, nor of any intimation in any of the opinions of that court, precluding such approval by implication of the selections so made. In one of the cases above cited Mr. Justice MILLER said: "As regards the lands to be selected in lieu of those lost by sale, or otherwise, it may be that no valid right accrues to any particular section, or part of a section, until the selection is made and reported to the land office, and, *possibly*, not then until the selection is approved by the proper officer." 103 U. S. 742. In a later case, above cited, the same learned justice quotes the same language, and adds: "It is not easy to see how rights can be vested in any particular section or sections of the latter class [indemnity lands] until it is ascertained how many of the original odd-numbered sections are thus lost, and until the grantee has exercised *his right of* selection. . . . They [these latter] are not and cannot be made *specific* until the grantee's right of selection has been exercised." 110 U. S. 38, 39.

These are the strongest expressions of opinion coming from that court we have been able to find. The only objects Congress could have had in requiring the approval of the selections by the secretary of the interior were to insure

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selections "from the lands of the United States nearest to the tier of sections" in the place limits, and to avoid, as far as possible, controversies with other adverse claimants, and thus render as certain as possible the description of the lands owned by the company, which might otherwise be less certain. Here the lands were selected, and there is no claim that they were not, "nearest to the tier of sections" in place, nor that there are any adverse claimants to any of the lands, nor that the plaintiff had not the equitable right to all of the lands in question at the time of the levy and assessment of the taxes; but the right of taxation is resisted solely on the ground that, up to the time of bringing this suit, the plaintiff has been unable to procure patents of the lands from the general land office by reason of a mistaken notion as to the effect of a decision once made by the supreme court of the United States many years ago, but which mistaken notion can no longer be entertained in view of the recent utterances of the same court. We must hold that the secretary of the interior did, in effect, approve by implication of the selections made, certified, and presented to him as stated. If we are wrong in this we have the consolation of knowing that the error may be corrected. It is not the United States that is attempting to impose the taxes in question, but the municipal instrumentalities of the state, which conceded the plaintiff's equitable right to the lands. The mere fact that the lands in question were not held under patents from the United States did not prevent their being subject to taxation. *Railway Co. v. McShane*, 22 Wall. 444; *Tucker v. Ferguson*, 22 Wall. 527; *Ross v. Outagamie Co.* 12 Wis. 26; *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 51–56; *Witherspoon v. Duncan*, 4 Wall. 210; *Carroll v. Safford*, 3 How. 441; *S. C.* 44 U. S. S. C. R. 441, and notes; *Thomson v. Pacific R. R.* 9 Wall. 579.

The statutes declare that "taxes shall be levied upon all property in this state, except such as is exempted there-

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from. The terms 'real property,' 'real estate,' and 'lands,' when used in this title, shall include, not only the land itself, but all buildings, fixtures, improvements, *rights, and privileges* appertaining thereto. . . . The person holding the *contract or certificate* of sale of any real property *contracted* to be sold by the state, but not conveyed, shall be deemed the owner for such purpose." Secs. 1034, 1035, 1043, R. S. There is no claim that any of the lands in question are exempt by reason of sec. 1038, or any statute of this state. The special exemption given by ch. 21, Laws of 1877, the validity of which was sanctioned by this court, expired before the levy and assessment in question. *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37. In the language of the supreme court of the United States, "Congress has not seen fit, either expressly or by implication, to impose any restriction upon the taxing power of the state. That subject was remitted, as under the circumstances it might well be, wholly to her wisdom and discretion." 22 Wall. 571, 572. In the case last cited it was, in effect, held that "the equitable or inchoate title of the company to the residue of the lands" was capable of being mortgaged, and hence taxed. *Ibid.*

We must hold, upon principle as well as the authorities, that the plaintiff's equitable right to patents for all the lands in question was complete prior to 1883, and hence the equitable title was then fully vested in it so as to subject said lands to taxation in that year. *Ross v. Outagamie Co.* 12 Wis. 26; *Tucker v. Ferguson*, 22 Wall. 527; *Witherspoon v. Duncan*, 4 Wall. 210; *Wheeler v. Merriman*, 30 Minn. 379; *Gulf R. Co. v. Morris*, 13 Kan. 317; *Puget Sound A. Co. v. Pierce Co.* 1 Wash. T. (N. S.) 159; *Cass Co. v. Morrison*, 28 Minn. 257; *S. C.* 5 Am. & Eng. R. Cas. 404; *Cornelius v. Kessel*, 58 Wis. 237; *Fowler v. Scott*, *ante*, p. 509.

The mere fact that the taxes were not assessed to the plaintiff by name, nor to "unknown," is not a valid reason for

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sustaining this judgment. The statute simply requires that "real property shall be entered in the name of the owner, if known to the assessor, otherwise to the occupant thereof, if ascertainable, and otherwise *without any name.*" Sec. 1043, R. S.; *State ex rel. C., M. & St. P. R. Co. v. Blackstone*, 63 Wis. 364.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

McCourt, Respondent, vs. Bond, Appellant.

November 9—December 1, 1885.

(1) Replevin: Variance in description between affidavit and writ. (2) Voluntary assignment: Who may attack validity.

1. Where there was no uncertainty as to the property to be taken, and the right property was taken, on a writ of replevin, a variance between the description in the affidavit and that in the writ may be cured, if necessary, by amendment.
2. A defendant in replevin who does not show that in taking the property from the plaintiff he represented a creditor of the plaintiff's assignor and acted by virtue of legal process, stands in the position of a mere trespasser and cannot question the validity of the assignment under which the plaintiff was in possession.

APPEAL from the Circuit Court for *Price* County.

This is an action of replevin for a piano, commenced in a justice's court and taken thence to the circuit court by an appeal from a judgment in favor of the defendant. In the circuit court a jury was waived. Though the defendant's answer alleges that he took and holds the property under and by virtue of two several executions issued upon judgments against Mrs. A. M. Byrnes, the plaintiff's assignor, yet no evidence was introduced on the trial in the circuit court to sustain such allegation. The court found in favor

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of the plaintiff and rendered judgment accordingly, from which the defendant appeals. Other facts will appear from the opinion.

Willis Hand, for the appellant, contended, *inter alia*, that void process is not amendable. 4 Wait's Pr. 642; *Snedeker v. Quick*, 11 N. J. Law, 179. Without an affidavit to support the writ the suit must fail. Wells on Replevin, sec. 651. The writ must describe the property to be seized with such certainty that the officer can identify it. Wells on Replevin, sec. 171 *et seq.;* R. S. sec. 3731.

J. K. Parish, for the respondent.

Cole, C. J. In the affidavit the property was described as "one Hempstead piano, No. 17,945." In the writ it was described as "one Emerson piano." On the trial the circuit court permitted the writ to be amended so as to make the description correspond with that in the affidavit. It is claimed by the learned counsel for the defendant that this variance or defect was jurisdictional and could not be cured by an amendment. We are inclined to think no amendment of the writ was necessary, but, if it was, it was certainly competent for the court to permit it to be made. The proper piano was taken on the writ. Description is for the identification of the property sued for, and to aid the officer in seizing the right chattel. Here there was but one piano, therefore there was no room for any uncertainty as to the property. The officer could and did have no difficulty in identifying the piano he was commanded to take by his writ. The affidavit, which is deemed the complaint, described it accurately and fully. But if it was necessary to amend the writ so as to make the description therein read precisely as it did in the affidavit, the court had the power to allow it to be made.

The plaintiff claims title to the piano by virtue of an assignment made to him by A. M. Byrnes. Mrs. Byrnes as-

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signed to plaintiff all of her property, real and personal, of every kind, saving only such articles of household furniture and other effects as were exempt, for the benefit of her creditors. The plaintiff took possession of the piano under the assignment. The assignment on its face bears date August 14, 1883, but the plaintiff was permitted to show by parol testimony that it was in fact executed on the 15th of that month. This proof was made in order to avoid the objection that the inventory and list of creditors, which were not filed until the 25th of August, were not filed in time. We see no objection to proving the actual time the assignment was executed upon the facts of this case. See *Wadleigh v. Merkle*, 57 Wis. 517. It is said allowing the record to be contradicted and the dates corrected might injuriously affect the defendant. But the defendant did not show that he represented a creditor of the assignor, consequently he was in no position to question the validity of the assignment. This, perhaps, is a sufficient answer to some other objections which counsel makes, as that (1) no title to the property passed to the plaintiff by the assignment, because there was no proof that the assignor owned it; (2) it was not included in the inventory filed; (3) that no affidavit of the nominal assets was made and filed, so as to determine the amount for which the assignee should give bond, etc. We suppose possession of personal property is evidence *prima facie* of ownership. And, as plaintiff's counsel observes, since the defendant did not attempt to show that he represented a creditor of the assignor, and had taken the piano from the possession of the plaintiff by virtue of a legal process, he stood in the position of a mere trespasser. He had no right to challenge the title or right of possession of the plaintiff any more than any other stranger. Had he shown that he represented a creditor of the assignor, quite a different case would be presented. As it is, the judgment of the circuit court, we think, was correct, and must be affirmed.

By the Court.— Judgment affirmed.

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RICE and others, Respondents, vs. MORNER and another, Appellants.

November 9—December 1, 1885.

ATTACHMENT. *(1) Affidavit by agent: Means of knowledge. (2) Traverse of affidavit: Admission of sufficiency. (3) Fraudulent conveyance: Mortgage to secure more than due.*

1. Where an affidavit for an attachment is made by an agent of the plaintiff, if the required facts are positively sworn to, the agent's means of knowledge need not be stated.
2. By taking issue upon the allegations of fact in an affidavit for an attachment the defendant admits that the affidavit, if true, is sufficient.
3. The fact that an insolvent debtor executes to one of his creditors a mortgage to secure a greater sum than he owes to such creditor,—it not appearing on the face of the mortgage that it is given to secure future advances,—is sufficient to sustain a finding that the debtor has conveyed a part of his property with intent to defraud his creditors.

APPEAL from the Circuit Court for *Price* County.

During some portion of the year 1884, the plaintiffs (who are partners doing business at Milwaukee) sold goods on credit to the defendants, who were partners and retail merchants at Ogema, in Price county. November 28 in that year, the plaintiffs commenced an action against the defendants for the amount unpaid on account of such sales, and sued out a writ of attachment therein against the property of the defendants. An affidavit of plaintiffs' attorney, duly made in their behalf, was annexed to the writ, in which, among other things, it is stated that "the defendants have assigned, conveyed, disposed of, or concealed, or are about to assign, convey, dispose of, or conceal, their property, or some part thereof, with intent to defraud their creditors." Thereupon the sheriff seized certain property, by virtue of such writ, as the property of the defendants.

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The defendants traversed such affidavit, and a trial of the traverse resulted in a finding for the plaintiffs and an order sustaining the attachment. The defendants appeal from such order.

For the appellants there were briefs by *Willis Hand*, attorney, and *Jenkins, Winkler & Smith*, of counsel, and oral argument by *Mr. Hand.*

For the respondents there was a brief by *M. Barry* and *W. E. Wilber*, attorneys, and *Gardner & Gaynor*, of counsel, and oral argument by *Mr. Gardner.*

LYON, J. Counsel for the appellants contends that the affidavit attached to the writ is insufficient to authorize the execution of the writ, because it is made by an agent of the plaintiffs, who does not disclose his means of knowledge of the facts to which he deposes. The required facts are positively sworn to, which is sufficient without also stating the agent's means of knowledge thereof. *Anderson v. Wehe*, 58 Wis. 615. However, this appeal presents no question for determination other than the truth of the facts stated in the affidavit as grounds for executing the writ of attachment. The question of the sufficiency of the affidavit is not involved. On the contrary, by taking issue upon the allegations of fact contained in the affidavit, the appellants admit that the affidavit, if true, is sufficient. Hence the only question to be determined is, Had the defendants, on or before November 28, 1884, made, or were they about to make, a disposition of any portion of their property with intent to defraud their creditors?

It appears from the evidence that between the 15th and 28th days of that month the defendants executed to several of their creditors conveyances of and mortgages upon real estate, and delivered to some of them goods out of their store to apply upon or secure their indebtedness to such creditors, to the amount in all of over $3,000.

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On the 22d of the same month the defendant *Morner* said to Mr. Hand that if their creditors kept crowding them as they were doing, they (the defendants) would have to make an assignment. The defendants attempted to make a voluntary assignment for the benefit of their creditors on November 28, but after the attachment herein had been executed. In *Auley v. Ostermann*, decided herewith,[1] we hold that assignment void as against the creditors of Morner & Ostergren, the assignors. The insolvency of that firm at the time is demonstrated by the fact that the sworn schedules annexed to the assignment show that their debts exceeded even the nominal value of their assets by a considerable sum. The testimony is sufficient to sustain findings that during the time they were executing such conveyances they were being pressed by their creditors for payment or security, and that they were insolvent.

Among the mortgages so executed by the defendants was one to Mendel & Smith, dated November 15, 1884, for $1,200. That firm is scheduled in such assignment as creditors in the sum of $1,110.49. Of this sum $400 was for goods sold the defendants after the mortgage was executed. So at the date of the mortgage the actual indebtedness of the defendants to the mortgagees was but little more than $700.

It is conceded that the mortgage purports to secure more than the mortgagees' demand, but it is claimed that the testimony shows it was given to cover agreed future advances. That may be so, but it does not appear on the face of the mortgage. The above facts would fully uphold a finding that this mortgage is fraudulent as to other creditors of the defendants. In *Butts v. Peacock*, 23 Wis. 359, the late Mr. Justice PAINE, speaking of the effect of

[1] In the case of *Auley v. Ostermann*, a motion for a rehearing was denied February 2, 1886, and the cause will be reported, as of that date, in 65 Wis.—REP.

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just such a mortgage as this upon the creditors of the mortgagor, said: "It tends directly to deceive and mislead them, by inducing them to believe that the property is absolutely incumbered to the amount expressed on the face of the mortgage, when, in truth, it is not so. And it is clear that this might materially hinder them in the enforcement of their claims. . . . And a party is not to be heard to say that he did not intend what he knows to be the natural consequences of his actions."

Because the trial court might properly have found from the evidence that the defendants were insolvent when they executed the mortgage to Mendel & Smith, and that they executed the same to secure an amount much greater than the amount of their indebtedness to the mortgagees, with intent thereby to hinder and delay the plaintiffs and their other creditors, we cannot disturb the finding of the trial court that, when the traversed affidavit was made, "the defendants had assigned, conveyed, disposed of, or concealed a part of their property with intent to defraud their creditors."

Again, it appears that on November 22d the defendants executed to the Pritzlaff Hardware Company a mortgage on certain real estate, purporting to secure a debt of $400; and at the same time the defendant *Morner* executed a mortgage on another parcel of real estate belonging to the firm, but held in his name, to the same creditor to secure a debt of the same amount. The actual indebtedness, as shown by the sworn schedules before mentioned, was only $319.64. All that has been said concerning the Mendel & Smith mortgage applies with equal force to the Pritzlaff mortgage.

The testimony strongly suggests other indications of fraud; but it is quite unnecessary to determine whether there were other fraudulent transactions. Neither is it necessary to consider the other finding of the court: that

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when the traversed affidavit was made the defendants were about to assign, dispose of, or conceal a part of their property with intent to defraud their creditors. The finding that they had done so is a sufficient basis for the order sustaining the attachment.

By the Court.— The order of the circuit court is affirmed.

EMPEY, Appellant, vs. PLUGERT, Respondent.

November 10 — December 1, 1885.

Public lands: Jurisdiction of state courts to set aside decision of U. S. land office: Equity: What complaint must show.

1. A state court may have jurisdiction to inquire into the right of a party to a patent from the United States under the homestead act, and to reverse the decision of the land department adverse to such right, when procured by fraud or perjury; but such jurisdiction can be exercised effectually only when the title is vested in a party amenable to such jurisdiction, so that a judgment can be entered which will act effectually upon the title, and compel defendant to convey it to the party defrauded.
2. In exercising such a jurisdiction the court will not disturb the adjudication of the land department, except in clear cases of fraud, mistake, perjury, or violation of the law.
3. Where perjury is alleged as a ground for setting aside the decision of the land department, the complaint should show that the decision was the consequence of the false testimony or perjury and was not supported by other evidence, and also that the plaintiff used every reasonable effort to obtain evidence to contradict such false testimony. It must also be shown that an effort was made to obtain a rehearing before the land department.

APPEAL from the Circuit Court for *Langlade* County.

The case is stated in the opinion.

For the appellant there was a brief by *Grace & Alban*, and oral argument by *Mr. Grace*. They contended, *inter alia*, that the action could be maintained under sec. 3186,

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R. S. The plaintiff is in possession, and the receiver's receipt is presumptive evidence of title. R. S. sec. 4165; *Bracken v. Preston*, 1 Pin. 599; *Cornelius v. Kessel*, 58 Wis. 243. Ejectment may be maintained by a homestead claimant. R. S. sec. 3197. The only relief plaintiff could have was in equity. In an action at law the defendant's title would have prevailed, as the cancellation of plaintiff's entry would have been binding in such an action. *Bagnell v. Broderick*, 13 Pet. 436; *Lombard v. Cowham*, 34 Wis. 486; *Steel v. Smelting Co.* 106 U. S. 447; *Smelting Co. v. Kemp*, 104 id. 636; *Lamont v. Stimson*, 3 Wis. 545. Where fraud has been practiced upon the land department their rulings may be reviewed, and the courts can in a proper proceeding interfere and refuse to give effect to their action. *Lamont v. Stimson*, 3 Wis. 553; *Shepley v. Cowan*, 91 U. S. 340; *Steel v. Smelting Co.* 106 U. S. 452; *Johnson v. Towsley*, 13 Wall. 83; *Quinby v. Conlan*, 104 U. S. 426; *Baldwin v. Stark*, 107 id. 465; *Corbett v. Wood*, 32 Minn. 509; *Bross v. Wiley*, 6 Wis. 485.

Neal Brown, for the respondent, to the point that when the land officers act within the sphere of their jurisdiction, every legal intendment is to be made in favor of their decision, and fraud must be clearly shown, cited *Bracken v. Parkinson*, 1 Pin. 685; *Challefoux v. Ducharme*, 4 Wis. 554; *Ballance v. Forsyth*, 24 How. 185; *Foley v. Harrison*, 15 id. 433; *Steel v. St. Louis S. & R. Co.* 106 U. S. 447; *Baldwin v. Stark*, 107 id. 463; *Vance v. Burbank*, 101 id. 514; *U. S. v. Atherton*, 102 id. 372; *Shepley v. Cowan*, 91 id. 330; *Quinby v. Conlan*, 104 id. 420; *Landsdale v. Daniels*, 100 id. 118; *Johnson v. Townley*, 13 Wall. 72; *Moore v. Robbins*, 96 U. S. 530; *Marquez v. Frisbie*, 101 id. 473; *Warren v. Van Brunt*, 19 Wall. 646; *Gibson v. Choteau*, 13 id. 92. The rulings of the land department on disputed questions of fact made in contested land cases, are not open to review when collaterally attacked. *Shepley v. Cowan, supra; U. S.*

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v. Throckmorton, 98 U. S. 61; *Kinney v. Degman*, 12 Neb. 237; *Rush v. Valentine*, id. 513; *Sacramento Bank v. Hynes*, 50 Cal. 195; *Terry v. Hennen*, 4 La. Ann. 458; *Mitchell v. Cobb*, 13 Ala. 137; *State v. Bachelder*, 5 Minn. 223; *Randall v. Edert*, 7 id. 450; *Burrell v. Haw*, 40 Cal. 373; *Hosmer v. Wallace*, 47 id. 461; *Lewis v. Lewis*, 9 Mo. 183; *Jackson dem. McConnell v. Wilcox*, 2 Ill. 344; *Hill v. Miller*, 36 Mo. 183; *Stucker v. Duncan*, 37 id. 160; *Ford v. Morancy*, 14 La. Ann. 77; *Dilla v. Bohall*, 53 Cal. 709; *Powers v. Leith*, id. 711; *Rutledge v. Murphey*, 51 id. 388; *Boyce v. Danz*, 29 Mich. 146; *Mace v. Merrill*, 56 Cal. 554; *Gray v. McCance*, 14 Ill. 343; *Sandoz v. Ozenne*, 13 La. Ann. 616; *Monette v. Craft*, 7 Minn. 234. As to the kind of fraud which will warrant the courts in disregarding the decisions of the land officers, see, especially, *U. S. v. Throckmorton*, 98 U. S. 61. The plaintiff has not yet exhausted his remedy in the land department. It was the universal rule of courts of equity in former times, that they would not grant relief which the party could obtain in the tribunal whose decision was attacked. New trials are now granted freely in all the courts, and more freely in the land department, and the plaintiff should seek his remedy there, by appeal or motion for a rehearing. If surprised, he should have moved for a continuance to procure the necessary evidence. *Bateman v. Willoe*, 1 Sch. & Lef. 201; *Veech v. Pennebaker*, 2 Bibb, 326; *French v. Garner*, 7 Porter, 549; *Woodworth v. Van Buskirk*, 1 Johns. Ch. 432; *Paterson v. Bangs*, 9 Paige, 629; *Critchfield v. Porter*, 3 Ohio, 518; *Faltz v. Pourie*, 2 Dessau. 40; *Hill v. M'Neill*, 8 Porter, 432; Hilliard on New Trials, 1484; *Williams v. Lee*, 3 Atk. 223; *Powers' Ex'rs v. Butler's Adm'r*, 4 N. J. Eq. 465; *Gales v. Shipp*, 2 Bibb, 241; *Barrett v. Belshe*, 4 id. 348; *Stinnett v. Branch Bank*, 9 Ala. 120; *Duncan v. Lyon*, 3 Johns. Ch. 351; *Crim v. Handley*, 94 U. S. 652; *Marsh v. Edgerton*, 2 Pin. 230; *Hendrickson v. Hinckley*, 17 How. 443; *Hodgson v. Marine*

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Ins. Co. 1 Cranch, 460; *Creath's Adm'r v. Sims*, 5 How. 192; *Walker v. Robbins*, 14 id. 584.

ORTON, J. It is substantially alleged in the complaint that the plaintiff settled upon the land in dispute as a homestead claimant under the laws of the United States, paid the amount required by law, and complied with the requirements of the law by continued residence and cultivation, so as to entitle him to the final certificate therefor, and that he presented to the land office authorities due proof of the same; and that by a final decision of the secretary of the interior upon such proof he was denied the right to said certificate; but that he has remained and still is in the possession and occupancy of said land. In respect to the defendant it is alleged that he intruded upon said land by force, regardless of the right of the plaintiff as aforesaid, and paid the amount required to be paid by a homestead claimant of said land, and obtained a certificate therefor, and now claims that he is entitled to all the rights of a homestead claimant thereof, and that at the proper time he will be entitled to a patent of the United States to the same. It is further alleged that when the said plaintiff presented his proofs for the purpose of obtaining the final certificate for said land as aforesaid, the said defendant contested his right to the same, and by perjury and fraud in his evidence caused the secretary of the interior to decide against the claim of the plaintiff so made and proved, and to declare said claim void, and to cancel the same, and thereupon made said forcible and fraudulent entry upon said land, and by fraud and perjury obtained a certificate therefor as aforesaid. This land belongs to the United States, and was subject to homestead settlement under the laws thereof, and the title still remains in the United States, subject to the claim of the plaintiff as aforesaid; and the plaintiff in effect alleges that he has done everything, and performed

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every requirement of the law, to entitle him to a patent therefor. The prayer is that the defendant be adjudged to *release* to the plaintiff all his claim to said land, and that the plaintiff have *judgment* that he has complied with the homestead law and that he is entitled to said land. The circuit court sustained a general demurrer to the complaint, as we suppose, although other causes of demurrer than that the complaint does not state facts sufficient to constitute a cause of action are stated therein; such as a want of parties, and that there is an adequate remedy at law. From the order sustaining such demurrer this appeal is taken.

If the courts of this state have jurisdiction in such a case, it is not perceived what effectual remedy could be administered. There has been an adjudication of the land office department against the claim of the plaintiff; and the defendant has settled on the land as a homestead claimant, and obtained the first certificate as such. That certificate gives the defendant no right to the land, and he must thereafter perform all of the conditions of the homestead law before he will be entitled to a certificate upon which the patent can be issued. The law does not provide for issuing any certificate upon such entry, but probably the rule of practice of the land office provides for a certificate of some sort, as evidence that the homestead claimant has paid the money required, and entered on the residence and cultivation of the land preparatory to such continued residence for five years, and such cultivation as the law makes a prerequisite to the certificate upon which the patent is to issue. Sec. 2290, R. S. of U. S., prescribes how the applicant may make his first entry. He makes an affidavit that he is the head of a family, or twenty-one years of age, or has performed service in the army or navy, and that his application is for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not for the benefit of any other person. Upon filing such affidavit with the

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register or receiver of the land office, and upon payment of the money required, he is then permitted to enter the land. This is the preliminary step and the commencement in the performance of the future acts of continued residence upon, and the cultivation of, the land, and the proof thereof, as the conditions of the issuing to him of the certificate at the end of five years, or, if he has been a soldier, at the end of that time deducting his time of service in the army. Sec. 2291 provides that "no certificate shall be given, or patent issued therefor, until the expiration of five years from the date of such entry," etc.

The defendant has made and filed such affidavit, and paid the initiation fee, and entered upon the settlement of the land. He is yet to secure a homestead therein by residence and cultivation. He has yet secured no right to the land, but a mere privilege or permission to enter upon it for the purpose of obtaining title to it by the performance of such conditions. He may never secure or be entitled to the land. The title still remains in the government and may so remain.

First. What right or claim to said land or interest in it has he that he could *release* to the plaintiff according to the prayer of the complaint? Has he the possession? So has the plaintiff. If he is an intruder or trespasser without legal right (and he has no legal right if the plaintiff is entitled to the patent of the United States, as he claims), then the plaintiff's remedy, if he has any, is in the proper possessory action at law. The defendant's right of entry upon the land is a legal right, if he has any. If he has none, then he has no right or title to release. If he has a legal right to so enter, then neither a court of equity nor of law can extinguish or cancel it, or adjudge its release to another. But if all the right the defendant claims is released to the plaintiff, it would not make his title or right any better. It is apparent that the remedy sought by this part of the prayer would be ineffectual and of no benefit

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to the plaintiff. If the defendant should release to the plaintiff whatever right or claim he may have, it would not give the plaintiff any better right than he had before by his settlement and cultivation of the land for the requisite time. The law does not provide for any action or adjudication upon such a preliminary entry. The land officer decides nothing. The land may or not be subject to such entry. That is the risk of the applicant.

Second. The other part of the prayer is for "judgment that the plaintiff has complied with the homestead law and is entitled to said land." At the proper time the plaintiff attempted to make and present his proofs of the requisite residence and cultivation of the land in order to obtain the final certificate and the patent of the United States to said land; and then it seems that his right thereto was contested, and proof was offered that he had changed his residence and abandoned said land more than six months at one time during such period, and the secretary of the interior deemed such proof satisfactory as to such change of residence and abandonment, and decided that he had no right to such certificate and patent, and thereupon the said land reverted to the government, according to sec. 2297, R. S. of U. S.

It appears by the complaint that the defendant was sworn as a witness at such contest before the land officers, and that his testimony tended to prove that the plaintiff had so changed his residence and abandoned said land for more than six months at one time during such period, and that the secretary of the interior considered and weighed such evidence of the defendant in making up his opinion in the case, and that said evidence and the absence of the testimony of the plaintiff's wife rejected by him, resulted in a different decision of the secretary of the interior than would have been made had Mrs. Empey's evidence been received and the defendant's evidence been rejected. It is alleged that said testimony of the defendant was false,

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and that he therein committed perjury. It is not alleged, however, that the proofs offered by the plaintiff were sufficient to show his right to the certificate and patent, or that they did not show such change of residence or abandonment, and it is claimed that such adverse decision was partly owing to the absence of the testimony of Mrs. Empey, and it is not claimed that it was caused wholly by the testimony of the defendant. But conceding that the complaint shows substantially that the testimony of the defendant procured such adverse decision of the secretary of interior, it does not appear but that such testimony might have been contradicted and proved false and discredited, as well then before the secretary of interior as now before the courts, excepting that the testimony of Mrs. Empey was rejected. The statute provides that the facts of residence and cultivation shall be proved by two credible witnesses other than the applicant, and the complaint does not state whether such proofs were made, or could have been made; but it is stated that on the contest the plaintiff offered evidence to show his compliance with the law as to residence, and that the defendant produced witnesses to prove the non-residence of the plaintiff, and that such evidence was considered and acted upon. How does the plaintiff know that the decision would have been different if the false testimony of the defendant had not been given? It is true, he alleges that said testimony and the absence of that of his wife resulted in a different decision than would have been made without it and with the testimony of his wife. But the complaint does not show that the plaintiff knows or can know that fact. The defendant's testimony was cumulative to the testimony of other witnesses on the same side of the question, and the plaintiff's own evidence may have shown that he had changed his residence and abandoned the land, for aught that appears in the complaint. This is a vital defect in the complaint, in attacking

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the adjudication of the land department in the contest, if the court has jurisdiction in this case to reverse or annul the decision of the secretary of interior. The gist of such an action is not the *perjury* of the party, but the *unjust decision* or judgment consequent upon it, and it must therefore be shown that the decision was not supported by other evidence, and was the consequence of the false testimony or perjury of the party. *Abbott v. Bahr*, 3 Pin. 193; *Stowell v. Eldred*, 26 Wis. 504; *Loucheine v. Strouse*, 49 Wis. 623.

By the same authorities there should have been made by the plaintiff every reasonable effort to have obtained testimony to contradict the false testimony of the defendant before the land officers, and diligence must be shown to have been used in procuring such testimony. There should have been made an effort to reopen the case, and for its rehearing, upon the showing that such testimony was false and perjured and that the plaintiff was ready and able to prove the same. On a motion to open such a judgment and for rehearing these things must be shown. *Stowell v. Eldred, supra.*

The case so far has been treated as if the court had jurisdiction in such a case. It would seem to be elementary and axiomatic that a court of equity will not assume jurisdiction of a cause in which adequate relief cannot be given. If the court in such a case should decide that the decision of the secretary of the interior was wrong and based upon perjured testimony, and that the plaintiff was entitled to the final certificate and the patent for the land, and go further, even, and reverse, set aside, vacate, or annul his decision and judgment, how could it be enforced, and what would be its effect? Neither the United States nor the executive departments of the government are amenable to the state courts. The decision would still stand and be enforced, and a patent would not be issued to the plaintiff, and might be issued to the defendant upon his final proofs.

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The judgment of the court in such a case could not operate upon or in any way affect the *title* of the land, for the title is still in the government, or upon the right to the title, which would be respected by the government or its departments. The courts may have jurisdiction to inquire into the homestead right of a party to the patent of the United States under the laws of Congress, and to reverse the decision of the land department adverse to such right, when procured by fraud or perjury; but such jurisdiction can be exercised effectually only when the title is vested in a party amenable to such jurisdiction. In such a case, if it is found that the plaintiff had been defrauded out of his homestead right, and consequently his right to the patent of the United States, by the opposite party, who, by the same fraud, has procured such patent to himself, or by his perjury, in equity such title of the defendant will be held to inure to the plaintiff, and a judgment may be entered which will act effectually upon such title and compel the defendant to convey it to the plaintiff. But in exercising such a jurisdiction the court will not disturb the adjudication of the land officers in respect to such right, except in clear cases of fraud, mistake, perjury, or violation of law. This doctrine is well settled by this court and other state courts, and by the courts of the United States. *Lamont v. Stimson*, 3 Wis. 545; *Bross v. Wiley*, 6 Wis. 485; *Lombard v. Cowham*, 34 Wis. 486; *Morton v. Green*, 2 Neb. 441; *Corbett v. Wood*, 32 Minn. 509; *Gaines v. Thompson*, 7 Wall. 347; *Secretary v. McGarrahan*, 9 Wall. 298; *Litchfield v. Register*, 9 Wall. 575; *Johnson v. Towsley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330; *Marquez v. Frisbie*, 101 U. S. 473; *Smelting Co. v. Kemp*, 104 U. S. 636; *Steel v. Smelting Co.* 106 U. S. 447; *Baldwin v. Stark*, 107 U. S. 463; *Smith v. Ewing*, 23 Fed. Rep. 741; *Casey v. Vassor*, 4 McCrary, C. C. 127. Many other cases are cited in the brief of counsel to the same effect.

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The point is made by the learned counsel of the appellant that this action may be sustained under sec. 3186, R. S. That statute requires the plaintiff to have both title and possession, and sec. 3197, R. S., gives to a homestead settler the right only to bring ejectment. How far in such an action the decision of the land officers may be reviewed is a question not in this case. The land department has still jurisdiction of this case, and may finally decide in favor of the plaintiff's, and against the defendant's, homestead right, and application may still be made to the secretary of the interior to review his former decision. This case is *sui generis*, and, so far as we know, without precedent. The possession of the land as between these parties may be within the control of the courts, but this question is not in the case.

By the Court.—The order of the circuit court is affirmed.

BARDEEN, Administrator, etc., Respondent, vs. MARKSTRUM, Appellant.

November 10 — December 1, 1885.

(1) Vendor and purchaser of land: Eviction necessary to recovery for breach of covenant of seizin. (2) Evidence: Transactions with deceased persons.

1. The presumption is that the grantee in a warranty deed went into possession of the land granted and has not been disturbed therein, and he must show the contrary in order to recover the consideration paid, or to defeat an action upon a promissory note given as a part of such consideration.

[2. Whether after the decease of the payee the maker of a note should be allowed to testify that it was given as part of the consideration for land conveyed to him by the payee, not determined.]

APPEAL from the Circuit Court for *Marathon* County. The case is stated in the opinion.

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For the appellant there was a brief by *Eldred & Brown*, attorneys, and *Silverthorn, Hurley & Ryan*, of counsel, and oral argument by *Mr. Neal Brown*. They contended, *inter alia*, that, for the purpose of identifying the note and deed and showing what was the consideration of each, the evidence of the defendant should have been admitted. One of his answers which was stricken out was that the land was the consideration for the note. This related in no way to a transaction with the intestate. *Stewart v. Stewart*, 41 Wis. 624; *Page v. Danaher*, 43 id. 221; *Daniels v. Foster*, 26 id. 686; *Hier v. Grant*, 47 N. Y. 278. The burden of proof was upon the plaintiff to show that his intestate had good title to the land conveyed. *Noonan v. Ilsley*, 21 Wis. 140; *Beckmann v. Henn*, 17 id. 412; *Mecklem v. Blake*, 16 id. 102; *Abbott v. Allen*, 14 Johns. 248; *Swafford v. Whipple*, 3 G. Greene, 261; *Bradshaw's Case*, 5 Coke, 109. But under the ruling of the circuit court the defendant was compelled to prove a negative.

For the respondent there was a brief by *Bardeen & Mylrea*, and oral argument by *Mr. C. N. Brown*. To the point that the presumption was that the defendant took possession of the land and had never been disturbed therein, and that to make his defense available he must show a total failure of consideration by reason of a defect in title and an eviction from the possession, they cited, besides cases cited in the opinion, *Hall v. Gale*, 14 Wis. 54; *Hill v. Butler*, 6 Ohio St. 207; *Small v. Reeves*, 14 Ind. 163; *Morrison v. Underwood*, 20 N. H. 371; *Abbott v. Allen*, 2 Johns. Ch. 519; *Bumpus v. Platner*, 1 id. 213; *Banks v. Walker*, 2 Sandf. Ch. 344. The testimony of the defendant as to the consideration for the note was properly stricken out, under sec. 4069, R. S. *Littlefield v. Littlefield*, 51 Wis. 23; *Kœnig v. Katz*, 37 id. 153; *Stewart v. Stewart*, 41 id. 624.

Orton, J. This action was brought to recover on a promissory note for $100, given by the defendant, *K. S. Markstrum*,

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to Elisha Philbrook in his life-time. The answer was a counterclaim that the note was given as part consideration for certain lands conveyed by Philbrook to the defendant by warranty deed for $200 consideration, $100 paid down, and this note given for the balance thereof, and that Philbrook had no title to said lands, and that there was a breach of the covenant of seizin; and judgment for $100 against the plaintiff is asked. Testimony of the defendant that said note was given as part of the consideration of said deed was rejected by the court upon the motion of the plaintiff's counsel, on the ground that such testimony related to a transaction between the defendant and said Philbrook, since deceased, and was therefore incompetent under the statute. Thereupon judgment was rendered against the defendant for the amount of the note, interest, and costs, no other evidence having been offered except the deed and of want of title. We are inclined to think that such testimony was properly rejected; but the primary objection is to the counterclaim itself, as it was neither alleged nor proved that the defendant did not go into and is not still in possession of the premises under said conveyance, or has been evicted therefrom or disturbed therein.

The counterclaim implies a good defense against the note for want of consideration, and claims judgment for the $100 paid. It is not a counterclaim for the damages upon the breach of the covenant of seizin in the conveyance of the land, for which this note was *not* given as a part of the consideration thereof, as an affirmative cause of action irrespective of the note. But in either case nothing but nominal damages can be recovered without proof of eviction, or some disturbance, expense, or inconvenience by reason of the want of title to the premises. This question has been so many times so decided by this court that mere reference to the cases only is necessary. *Taft v. Kessel*, 16 Wis. 273; *Horton v. Arnold*, 18 Wis. 212; *Ludlow v. Gilman*, 18 Wis.

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552; *Mecklem v. Blake*, 22 Wis. 495; *Noonan v. Ilsley*, 22 Wis. 27; *Eaton v. Lynan*, 30 Wis. 41; *Smith v. Hughes*, 50 Wis. 620. In the absence of all evidence to the contrary it must be presumed that the defendant is in possession and went into possession under said deed, so that the whole consideration of the note had not failed, and he has yet received no damage by want of title. *Talmadge v. Wallis*, 25 Wend. 107.

There appears to be no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

DeVoin, Respondent, vs. Michigan Lumber Company, Appellant.

November 10 — December 1, 1885.

Bailment: Use of hired horses for other work than contracted for: Liability of bailee for injury: Driver employed by owner.

Where one party hires his team and a driver paid by him to another party, to be used in a certain place or for a certain purpose, and while being used in a different place or for a different purpose the team is injured without any negligence of the driver in handling the team, the bailee is responsible for such injury. The driver is not the agent of the owner in the act of obeying the directions of the bailee at a place or in a kind of work not contemplated by the contract of hire.

APPEAL from the Circuit Court for *Marathon* County.

The case is thus stated by Mr. Justice Cassoday:

"January 1, 1883, the plaintiff resided at Rhinelander, and owned the span of horses in question and a pair of sleighs, and had a hired man to drive them, to whom he was paying $35 per month. The defendant was at the time engaged in lumbering; getting in saw-logs at two different camps, one at Rocky Run and the other at Sugar Camp.

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About the time named the defendant hired of the plaintiff his said team, sleighs, and driver to haul supplies from Rhinelander to the camps named, for which the defendant agreed to pay the plaintiff $75 per month. At the same time it was agreed between them that the driver and team should be boarded and kept by the plaintiff whenever they were in Rhinelander at an agreed price, to be paid by the defendant. After being engaged for some days in hauling supplies to Sugar Camp, the defendant obtained permission from the plaintiff to have the team and driver haul logs at Rocky Run for a few days, and they were sent there for that purpose by the plaintiff. After hauling logs at that place one day the defendant's foreman of that camp directed the driver to take the team, and go and haul some hay from a place on the Tomahawk river about ten miles north of that camp, and also sent one of the defendant's men with him to show him the way and to help load the hay. On reaching the first stack, which had been partly hauled to the camp, the guide directed the driver to drive up to the next stack, which was close by the river, and in a direction where there was no road, and across water frozen over and covered with snow. In going to the second stack the driver sat upon the sled and the guide walked behind it. When the horses got upon the ice it broke through, and they were both drowned. This action is to recover their value. The verdict was for the plaintiff. From the judgment entered thereon the defendant appeals."

H. H. Grace, for the appellant, to the point that the driver was the agent of the plaintiff, who never parted with control of the team, and that the defendant was therefore not liable, cited Story on Agency (9th ed.), 563, 455; *Hughes v. Boyer*, 9 Watts, 563; 2 Thompson on Negligence, 892, note 12, 893, note 13.

L. A. Pradt, for the respondent.

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CASSODAY, J. The court stated to the jury that it was admitted, or proved by uncontradicted evidence, that at the time of the accident the team and driver "were in the employ of the defendant . . . for the purpose of hauling logs." It is now claimed that this was a controverted question of fact for the jury to determine. The only witness of the defendant on that question testified, in effect, that he, in behalf of the defendant, made the contract of hire with the plaintiff; that he hired the team and driver "to haul logs, and to haul supplies to Sugar Camp or Rocky Run, just as he was a mind to have him." It is undisputed that for the time being the team and driver had stopped hauling supplies, and had gone to Rocky Run for the express purpose of hauling logs, and had hauled logs there for one day. There is no claim, nor any testimony to support any claim, of any express contract with the plaintiff that the team should be used in hauling hay or supplies from any other place than Rhinelander. The defendant did give evidence tending to prove that, by the general custom in the vicinity, it was understood that when a team was hired to haul logs it included the right to use the same to haul a load of supplies, or a load of hay, or anything of that description. The court was very liberal in its allowance of evidence of such general custom. The plaintiff denied any knowledge of the existence of any such custom. The question whether such custom existed was fairly submitted to the jury. The verdict for the plaintiff negatived the existence of such custom, and established the fact as a verity that by the express contract of hire the team was only to be used in hauling supplies from Rhinelander, or logs at Rocky Run.

The defendant requested the court to instruct the jury, in effect, that the driver was the agent of the plaintiff; that his consent to go for the hay was the consent of the plaintiff, and hence that he could not recover; and that if the in-

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jury occurred through the driver's negligence, then the plaintiff could not recover. For the refusal to give such several instructions, errors are assigned.

In a limited sense the driver was the agent of the plaintiff. He was such agent in caring for and driving the team in hauling supplies from Rhinelander and logs at Rocky Run. That included the proper feeding and handling of the team. He was only twenty-two years of age, but had some experience in driving teams. There is no claim nor evidence tending to prove that he was negligent in the act of handling the team. There was a road to the first stack. It had been cut by the guide sent with the driver. Near the first stack the road was along on the ice on the river. There was no difficulty in getting to the first stack. Between that stack and the other stack there was no road nor any broken path. It seems to have been, or at least a portion of it, right along on the river. But the water was frozen over, and the ice was covered with snow. The space between the two stacks appeared to be level snow, and there was no unusual appearance around or about the place where the accident occurred. The driver had never been there before. There is no evidence that there was any safer way or any other way to the second stack. There is no evidence that the team was not driven properly and in the way directed by the guide, who appears to have known of the *locus in quo.* The age of the guide is not given, but he was selected by the defendant's foreman for the purposes indicated. The accident did not occur by reason of any negligence in the mere driving or handling the team, but in obeying the directions given by the foreman and guide, and driving the team into a dangerous place without knowing it to be dangerous. If the driver was negligent at all, it was in obeying directions and driving out upon the ice for the first time without first testing its strength. If the guide was negligent in walking behind the sled while being driven

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to the second stack, instead of going ahead of the team and testing the ice, yet, as the service in which they were then engaged, was not such as was contemplated in the contract of hire, he was not a co-employee with the driver in such a sense as to relieve the defendant from liability on account of such negligence. *Railroad Co. v. Fort*, 17 Wall. 553; *Mann v. Oriental P. W.* 11 R. I. 152; *Lalor v. C., B. & Q. R. Co.* 52 Ill. 401.

Was the driver the agent of the plaintiff in the act of obeying the directions of the defendant's foreman and guide, at a place distant from the camp, and in a kind of work not contemplated by the contract of hire? It seems to us that he was not. Of course, the driver was selected by the plaintiff to drive the team in performing the work contemplated in the contract of hire. Had the injury occurred by reason of any negligence or incompetency of the driver while engaged in the work or service so contemplated by the contract of hire, then the loss would have fallen upon the plaintiff; for, by selecting him to drive his team, he had taken upon himself the responsibility of the requisite care and competency of the person so selected in doing the work he had contracted to have him do. *Quarman v. Burnett*, 6 Mees. & W. 499; *Jones v. Mayor*, L. R. 14 Q. B. Div. 890; *Huff v. Ford*, 126 Mass. 24; *Joslin v. Grand Rapids I. Co.* 50 Mich. 516. And yet, while engaged in such contemplated work, had the team been injured solely by reason of having been driven by the careless direction of the defendant into some place of danger, not obvious to the senses and unknown to the driver, there would be no question of the defendant's liability. *Indermaur v. Dames*, L. R. 2 C. P. Div. 311. In such contemplated service the defendant was still under obligation to exercise reasonable diligence in providing a suitable place for the team to be driven; or, in other words, not to carelessly cause the team to be driven into a place of concealed danger unknown to the driver. *Ibid.;*

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Coombs v. New Bedford C. Co. 102 Mass. 583, 584; *Swoboda v. Ward*, 40 Mich. 423; *Parkhurst v. Johnson*, 50 Mich. 70. In case of injury in such contemplated service, the mere fact that the driver was in a limited sense the agent of the plaintiff, as indicated, would not take away the liability of the defendant, under whose orders and control he was acting at the time, for negligently inducing him to drive into a place of concealed danger. *Rourke v. White M. C. Co.* L. R. 2 C. P. Div. 205.

But the case at bar is more favorable for the plaintiff than any supposed. Here the injury occurred when neither the team nor the driver were engaged in the work contemplated in the contract of hire. They were both, however, doing service for the defendant under the directions of its foreman and the guide selected by him. The team was drowned solely by reason of being driven by such direction into a place of concealed danger unknown to the driver. Had not the team at the time of the injury been accompanied and driven by the driver selected and employed by the plaintiff, there could be no question but what such diverted use of the team would have been a conversion within all the authorities. *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Hall v. Corcoran*, 107 Mass. 251; *Woodman v. Hubbard*, 25 N. H. 67; *Hart v. Skinner*, 16 Vt. 138. The same rule has been applied to the unauthorized use of slaves. *Horsely v. Branch*, 1 Humph. 199; *Scruggs v. Davis*, 5 Sneed, 261; *Moseley v. Wilkinson*, 24 Ala. 411; *Fail v. McArthur*, 31 Ala. 26; *Spencer v. Pilcher*, 8 Leigh, 566. For the loss during such diversion or misuse, the defendant would have been absolutely liable, even though it occurred by reason of the fault of the horses or as a mere accident. *Lucas v. Trumbull*, 15 Gray, 306; *Perham v. Coney*, 117 Mass. 102; *Fisher v. Kyle*, 27 Mich. 454; *Lane v. Cameron*, 38 Wis. 603. Does the mere fact that the driver consented to the diversion of employment, and was

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in the act of driving the team when the accident occurred, relieve the defendant from the liability which would otherwise have existed? We must answer this question in the negative. There is no claim that he participated in, or was even present at the time of making, the contract of hire; nor that he had any authority to modify that contract or make a new one. The case is quite similar in principle to *Crocker v. Gullifer*, 44 Me. 491, where one of the drivers had a conditional interest in the horses and consented to the diversion, but it was held that the defendants were liable for their value, notwithstanding they were accidentally destroyed by fire without the neglect or fault of any one.

By the Court.—The judgment of the circuit court is affirmed.

See note to this case in 25 Am. Law Reg. 234, 238.—REP.

HANSON, Respondent, vs. ROTER and another, Appellants.

November 10—December 1, 1885.

Sale of chattels: Statute of frauds: Delivery: Part payment.

1. An oral contract for the sale and delivery of a quantity of logs valued at $100, no part of which has been delivered and no part of the purchase price for which was paid at the time of making the contract, is void under the statute of frauds.
2. The evidence in this case is *held* not to show that the agreement was that when the logs were deposited at the place designated the title should pass to the defendant without any further act on his part, or that any part of the purchase price was paid when the contract was made. *Morrow v. Reed*, 30 Wis. 81, distinguished.

APPEAL from the Circuit Court for *Marathon* County.

The case is stated in the opinion. A jury was waived and the trial by the court resulted in findings and a judgment in favor of the plaintiff. The defendants appealed.

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For the appellants there was a brief by *Silverthorn, Hurley & Ryan*, and oral argument by *Mr. Hurley*.

For the respondent the cause was submitted on the brief of *R. B. Salter*.

COLE, C. J. The basis of this action is a parol executory contract for the sale and delivery of a quantity of logs. The amount claimed to be due on the contract or for the breach thereof is about $100. The plaintiff in his testimony states the terms of the contract and the circumstances under which it was made, in substance as follows: He says: "I made arrangements with the defendants to get out logs in the fall of 1882, or winter; it was in *Mr. Roter's* store, at Abbotsford. I asked *Mr. Roter* if he would buy logs from us fellows up there. He said he would; that he would take all the logs I could get out. He told me the price he was going to pay for logs. He told me and Mr. Anderson that he would pay us the same price, viz., . . . for each and every thousand feet of the different kinds. . . . I was to put the logs by the railway track which runs by my place." The plaintiff further testified that *Roter* agreed to go and scale the logs got out every month, and pay for them, but did not do so. It appears that the plaintiff during the winter of 1882–83 deposited a quantity of logs at the place designated, which the defendants upon examination refused to accept and receive, because they were not merchantable. The defendants never have received any of the logs for that reason.

Now, on this state of facts, which we think we must assume to be correct, the counsel for the defendants takes the point that the contract is within the statute of frauds and void. The objection seems to us insuperable. It is needless to cite the statute, as it is familiar to all. But it is attempted to avoid the force of the objection by saying that when the plaintiff delivered the logs at the place agreed upon, the title to them passed to the defendants, and the sale became per-

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fect and complete. But there is not a particle of proof to sustain such a position. It was doubtless competent for the parties to agree that when the logs were deposited along the track of the railroad this should be a delivery of them to the defendants, and the title should pass even though they were to be subsequently scaled to ascertain the quantity to be paid for. That was the case in *Morrow v. Reed*, 30 Wis. 81. But there is no evidence of such a contract being made. The plaintiff does not swear that this was the contract, and there is nothing which will warrant the assumption that the parties ever intended such a result should follow. The case in its leading features is much like *Pike v. Vaughn*, 39 Wis. 499, and is ruled by that decision. So there is no ground for claiming that the contract was fully executed by a delivery and acceptance of the logs so as to take it out of the statute. There is not a particle of proof which will sustain such a conclusion.

Nor is there any ground for saying that the defendants paid some part of the purchase money, so as to supply the place of a written contract. The plaintiff says his talk with *Mr. Roter* about selling the logs was before Christmas, 1882; that some time afterwards he was in *Mr. Roter's* store, and got a pair of boots on the strength of hauling these logs. At the same time he also got some feed, which we assume, for the purposes of the case, was got with the same understanding, though the plaintiff does not say so. But if these articles were intended to apply on the contract, they would not have the effect to make the agreement valid. The buyer must, *at the time* the contract is made, pay some part of the purchase money. *Bates v. Chesebro*, 32 Wis. 594; *S. C.* 36 Wis. 636. It is claimed that according to *Mr. Roter's* testimony the contract for the sale of the logs was made in March, 1883, at the time the plaintiff got his boots and the feed on the agreement. *Mr. Roter* does say that his first conversation with the plaintiff with reference to the logs was about the first of March, 1883, and that he then let the

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plaintiff have a pair of boots and some feed. But he denies that any bargain was then made with the plaintiff for logs, only it was generally understood that the defendants were taking logs from any party that got them out in a shape they could use them. *Mr. Roter* says his recollection about the conversation with the plaintiff at this time was very indistinct; his testimony surely fails to show that any contract was then made.

It appears that in April, 1883, the plaintiff's attorney had an interview with *Mr. Roter* about these logs, and wrote a letter to Mr. Anderson that *Roter* had concluded to take all the merchantable logs belonging to Anderson and the plaintiff. It is claimed that this letter in some way made good the previous void contract; but the letter can have no such effect given to it, even if it were written by the authority of *Mr. Roter*. At most, it only amounted to a proposal on the part of the defendants to take all the merchantable logs which the plaintiff had got out and deposited by the railroad track. It does not appear that the plaintiff accepted this offer, or acted upon it. He relies upon the verbal contract made before Christmas. We have assumed that the logs were merchantable, and considered the case in that light, which is most favorable to the plaintiff. The logs were an ordinary article of traffic, like lumber, or other merchandise, and stand upon the same ground. It could not with propriety be said that the contract was for special skill and labor, as in *Meincke v. Falk*, 55 Wis. 427.

It is unnecessary to add that ch. 81, Laws of 1883, does not aid the plaintiff's case, for the plain reason that this law was enacted after the contract was made.

This case was tried by the court, a jury being waived. We must therefore reverse the judgment, and remand the cause with directions to dismiss the complaint.

By the Court.—It is so ordered.

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MILLARD and another, Respondents, vs. THE McDONALD LUMBER COMPANY, Appellant.

November 10 — December 1, 1885.

LOGS AND LUMBER. *(1) Conversion: Pleading: Damages: Evidence of title. (2) License to cut timber: Burden of proof.*

1. In an action for the conversion of lumber, brought against an innocent purchaser of the logs from which the lumber was made and which were wrongfully cut by his vendor from the plaintiffs' land, evidence of the plaintiffs' title to the land and of such cutting is admissible although the complaint contains only a general averment of plaintiffs' ownership of the lumber alleged to have been converted. [But the defendant being liable in such an action only for the value of the logs at the time of the cutting, it would seem to be better pleading to set out the description of the land and by whom and when the logs were cut therefrom; and it might be proper, on motion, to direct a complaint to be made more definite and certain in those respects.]
2. From the fact that a person cutting timber did so by the orders and under the authority of a person not the owner of the land, it will not be presumed that the latter had any license from the owner authorizing such cutting. *Lewis v. Disher*, 32 Wis. 504, distinguished.

APPEAL from the Circuit Court for *Marathon* County.

The complaint alleges that the plaintiffs were the owners and entitled to the immediate possession of 290,000 feet of sawed pine lumber, of the value of $4,060; and that the defendant on November 1, 1882, being then in possession of said lumber wrongfully converted the same to his own use, to the plaintiffs' damage $4,060. The answer was a general denial. The facts sufficiently appear from the opinion. There was a verdict for the plaintiffs assessing their damages at $1,052.70, being the stumpage value of the timber from which the lumber was manufactured, at the time the same was cut from the plaintiffs' land, with interest thereon from the time of such cutting. From the judgment entered upon such verdict the defendant appealed.

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For the appellant there was a brief by *Silverthorn, Hurley & Ryan*, and oral argument by *Mr. Hurley*. To the point that the defendant being liable, if at all, only for the value of the timber upon the land at the time of cutting, it had a right to be informed by the complaint of the facts constituting the cause of action against it for that amount, they cited Van Santvoord on Pleading (2d ed.), 277, ch. 4, sec. 2; *Williams v. Brunson*, 41 Wis. 418; *Riley v. Riley*, 34 id. 372; *Warren v. Bean*, 6 id. 120; *Eilert v. Oshkosh*, 14 id. 586; *Paine v. Trumbull*, 33 id. 164.

For the respondents there was a brief by *Grace & Alban*, and oral argument by *Mr. Grace*.

ORTON, J. The complaint of the respondents, as plaintiffs, is in the common form of trover and conversion of 290,000 feet of the plaintiffs' pine lumber of the value of $4,060, and the answer is a general denial. On the trial, when the plaintiffs' counsel offered in evidence their chain of title deeds to the lands from which the logs from which said lumber was made was wrongfully cut by one John C. Clark, who sold said logs to the defendant, the learned counsel of the defendant objected to such evidence because such facts were not stated in the complaint. The first exception taken was to the overruling of said objection.

The purpose of this evidence was to prove the plaintiffs' title to the lumber, and its value at the time the logs were cut, according to the rule of damages in such cases, in accordance with sec. 4269, R. S. It was not claimed but that the defendant was the innocent purchaser of said logs, and therefore such was the rule of damages. In *Smith v. Briggs*, *ante*, p. 497, it is held that, in respect to logs, timber, and lumber wrongfully cut on the land of the plaintiff, the action under said section is merely for the value thereof, and not for damages as in trespass *quare clausum*, and is merely an action of trover, and that the only object of alleging the

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wrongful cutting of the logs, timber, or lumber on the land of the plaintiffs is to show title to the same, and the time at which the value thereof should be ascertained. In such an action, of course, such facts are mere matters of evidence and not of pleading. *Tyson v. McGuineas*, 25 Wis. 657; *Swift v. James*, 50 Wis. 540; *Johnson v. Ashland Lumber Co.* 45 Wis. 119. If the learned counsel of the defendant had understood otherwise, they would have unquestionably demurred to the complaint, or have objected to any evidence under it, on the ground that it did not state a cause of action. The only objection made seems to have been rested on their surprise in not having been informed by the complaint of these facts which were then sought to be proved. The only relief in such a case is to have the complaint made more definite and certain in these respects on motion, under sec. 2683, R. S., and not by demurrer or objection to evidence. *Redmon v. Phœnix Fire Ins. Co.* 51 Wis. 298. Not having so moved, all objection to the complaint in these respects was waived. *Connors v. Taylor*, 13 Wis. 230. There was no objection to *all* evidence under the complaint, but only to this particular evidence. Had a motion been made for the plaintiffs to make their complaint more definite and certain in these particulars, we are disposed to think that it might have been very properly granted; for in such an action, where the plaintiffs only claimed as damages the value of the lumber when the logs were cut from their land, it would seem better pleading to set out the description of the land from which the lumber was cut, and by whom and when it was so cut, in order to apprise the defendant of what was intended to be proved in these respects.

The only other question discussed in the brief of the learned counsel of the appellant is raised in respect to the charge of the court and instructions asked, and that is whether, inasmuch as the person who did the cutting of the logs did so by the order and under the authority of Clark.

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it shall not be presumed that Clark had license or authority to do so. Where there are no other facts except the entry upon the lands of another and doing damage thereon, there is no presumption about it, but it is a trespass and wrongful. *Dexter v. Cole*, 6 Wis. 319; 2 Greenl. Ev. § 622; *Guilla v. Swan*, 19 Johns. 381. Where one enters upon the land of another with such an apparent authority as to shift the burden of proving it without license or authority upon the owner, then it may be that he would be required to prove such negative, but there must be at least *prima facie* evidence of such authority or license. The case of *Lewis v. Disher*, 32 Wis. 504, cited by the learned counsel of the appellant as holding otherwise, was where it appeared that certain persons had raised a crop of wheat upon certain premises which had been sold and deeded for taxes, and the question was whether it had been occupied within the three years by the original owner; and it was held that they must be presumed to have so occupied under the original owner and by his authority rather than that they were trespassers; and there was some evidence also of such authority, but not very strong, such as the testimony of the owner's son that he thought that his father gave them the right to go on the premises, and other circumstances to aid such a presumption. The presumption in that case was in favor of the right of the owner; not hostile to it, as it would be in this case. But in such cases as this, license from the owner must be pleaded and proved in defense of the trespass. In *Pomeroy v. M. & C. R. Co.* 16 Wis. 640, the same objection was made that it was not alleged "that the entry was contrary to the wishes of the plaintiff, or that it was made unlawfully," and it was held that this was presumed, "and that if any license was given by the [plaintiff] it was matter of defense." *Lockhart v. Geir*, 54 Wis. 134. And such is the elementary doctrine, without any conflict of decision. 1 Greenl. Ev. 79; Add. Torts, 376.

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The charge of the court appears to have been full and correct, and the verdict of the jury seems to have been warranted by the evidence, and we find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

MANNING, Respondent, vs. HEADY, imp., Appellant.

September 22 — December 23, 1885.

(1) Service by publication: Affidavit. (2) Filing complaint. (3) When order for publication not proof of requisite facts. (4) Personal service outside of state. (5) Action to quiet title: Disclaimer by defendant.

1. To authorize an order for service by publication under subd. 1, sec. 2639, R. S., the affidavit must show that the nonresident defendant has property within the state, or that the cause of action arose within the state.
2. The complaint must be filed before an order for service by publication is made.
3. Where the record shows that an order for service by publication was made upon insufficient or defective proof, sec. 2641, R. S., is inapplicable, and the order itself is not proof of the existence of the requisite facts.
4. Personal service of the summons and complaint outside of the state will not give jurisdiction if no valid order for service was made.
5. An action to quiet title, under sec. 3186, R. S., was brought by the owner of land against one who had purchased the same at an execution sale under a void judgment. Just before the action was commenced the defendant had assigned the certificate of such sale to his father, for a nominal consideration, in order to avoid the consequences of the action, but the certificate still remained entirely under his control, and such assignment was kept secret from the plaintiff. In his answer the defendant did not disclaim all title to the land and certificate and offer to give a release. *Held*, that judgment was properly rendered against him.

APPEAL from the Circuit Court for *Jefferson* County.

The action was brought under sec. 3186, R. S., to remove

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a cloud from the title to twenty acres of land in Jefferson county, and to enjoin the execution of a deed thereof by the sheriff of said county to the defendant *Henry Heady*, under a certificate of sale issued to said defendant upon an execution sale. The land in question formerly belonged to Green Manning. The plaintiff, *Nancy Manning*, was in possession thereof at the time of commencing the action, and claimed title thereto under and by virtue of a judgment of divorce rendered in her favor against the said Green Manning on February 15, 1881, by which his title to said land was divested and the same was vested in her.

On September 13, 1880, one Harriet McCune had obtained a judgment by default against said Green Manning, and under the execution issued thereon the land in question was sold to the defendant *Henry Heady*, to whom the sheriff executed a certificate of such sale in due form. The complaint alleges that said judgment and execution were void because in said action of *McCune v. Manning* the court never acquired any jurisdiction of the defendant therein, Green Manning, who, at the time of the commencement of that action, was a resident of the state of Iowa; and that the land in question was, also, at the time of said execution sale, exempt, as the homestead of said Green Manning and his family. The complaint further alleges that the defendant *Henry Heady* claims title under said execution sale, and has refused to release and quitclaim such title to the plaintiff.

The answer of the defendant *Henry Heady* alleges that before the commencement of this action he sold and assigned the said certificate of sale, and has not since been the owner thereof or had the same in his possession or under his control or had any interest in the land in question; that in purchasing said land at the execution sale and in taking the certificate of such sale he had acted solely as the agent and trustee of the said Harriet McCune; and that long before the commencement of this action the plaintiff

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had been informed that such certificate was in fact the property of said Harriet McCune. The defendant sheriff did not answer.

The circuit court found as facts, among other things, that in bidding off said land at the execution sale the defendant *Henry Heady* was acting as attorney for Harriet McCune, but taking said certificate in his own name; that the sheriff's certificate delivered to said defendant, as well as the one filed in office of the register of deeds, showed upon their face that said defendant was the owner of the same; that said defendant, *Henry Heady*, assigned said certificate to his father, John Heady, who resided with him, for a nominal sum, March 22, 1882, to avoid the consequences of this action which he then expected would soon be commenced against him; that John Heady assigned said certificate of sale to the said Harriet McCune, June 12, 1882; that said assignments from *Henry Heady* to John Heady and from the latter to Harriet McCune were not made matters of record and were intentionally kept from the knowledge of the plaintiff and her attorneys until the trial of this action; that neither the certificate of sale nor either of said assignments was ever delivered to Harriet McCune, but they all remained under the control of *Henry Heady*, who held the same as the attorney or trustee of Harriet McCune.

As conclusions of law the court found that the judgment of Harriet McCune against Green Manning was void as against the plaintiff, *Nancy Manning;* that the land in question, transferred to the plaintiff by the judgment of divorce, was exempt, as the homestead of Green Manning; that the execution issued on the judgment in favor of Harriet McCune, and the sale thereon, were void as against the plaintiff, and that she is entitled to an injunction restraining the sheriff from executing any deed under or by virtue of such sale or the certificate thereof.

From the judgment entered in accordance with such findings, the defendant *Henry Heady* appealed.

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Henry Heady, appellant, in person.

For the respondent the cause was submitted on the brief of *Page & Cass.*

The following opinion was filed October 13, 1885:

COLE, C. J. If the court never acquired jurisdiction of the defendant in the action of *McCune v. Manning*, the judgment in the case must be affirmed. For, aside from all questions of homestead rights, the decree of divorce transferred and vested the title to the twenty acres of land in dispute in the plaintiff; she is therefore in a position to assail the validity of that judgment and the sale under it, and is entitled to the relief granted, if it is void. The inquiry, then, is as to the validity of the judgment in the McCune suit. At the time of the commencement of that action, and for some time previously thereto, the defendant, Green Manning, was and had been a resident of the state of Iowa. Jurisdiction over him was attempted to be acquired by publication. The statute provides, where the defendant is a nonresident and has property within the state, or the cause of action arose within the state, that service of summons may be made by publication on obtaining an order therefor as therein prescribed. R. S. sec. 2639. The order must be made by the court or judge thereof upon an application based upon the complaint, duly verified and filed, and an affidavit, together showing the facts required to exist, and that the plaintiff is unable with due diligence to make service of the summons upon the defendant in respect to whom the order is applied for. Sec. 2640. We have in the record the affidavit and complaint upon which the order of publication was made. While the affidavit states that Green Manning was a nonresident of this state, and resided at Charles City, state of Iowa, it wholly fails to show that he had property within this state, or that the cause of action arose within this state. These essential

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facts must be shown to exist to authorize the granting of the order of publication. The order is dated April 27, 1880, and recites that it was granted upon reading the complaint in the action, and the affidavit of the plaintiff therein, "which are filed in the office of the clerk of the circuit court for Walworth county," and, it appearing to the satisfaction of the circuit judge "from said complaint and affidavit" that the plaintiff has a cause of action, etc., the order was made. As a matter of fact the indorsement of the clerk upon the original complaint shows that it was not filed in his office until the 13th of September, 1880. It should have been filed before the order of publication was made. *Cummings v. Tabor*, 61 Wis. 185.

But the affidavit states no statutory ground for making the order, consequently jurisdiction over the defendant was not obtained. In view of the recitals in the order, there can be no presumption that there was other proof made of the existence of the required facts aside from what appeared in the affidavit and complaint. And since these do not show the existence of the necessary facts, the order of publication was unauthorized.

It is said, however, that sec. 2641 makes the order presumptive proof of the existence of all facts required to exist to authorize the same to be made, and conclusive in all collateral actions and proceedings. We think this section was not intended to apply to a case where the record itself shows that the order was made upon insufficient or defective proof. Here the record shows what proof was made, and we must look into it to see if it authorizes the order. This is a question as to the service of summons where the record shows that the necessary and proper proof of the existence of the required facts was not made; therefore jurisdiction by publication was never obtained. If the order had recited that it appeared to the satisfaction of the circuit judge that the defendant was a nonresident and had

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property within this state, there being nothing in the record to show what proof was made, the presumption would be that it was sufficient to authorize the order of publication. *Storm v. Adams*, 56 Wis. 137. But here the order contains no such recital, while the record shows that it was made upon an affidavit fatally defective. We therefore must hold that jurisdiction was not helped out by sec. 2641.

It is true, the record shows that the summons and complaint were personally served upon Green Manning, in Iowa; but this service did not give the court jurisdiction over him, because there was no valid order of publication made. *Weatherbee v. Weatherbee*, 20 Wis. 499; *Keeler v. Keeler*, 24 Wis. 522. The judgment in the *McCune Case*, being void for want of jurisdiction over the defendant, it follows that no legal sale could be made under it.

The plaintiff was in possession of the twenty acres of land, and had the legal title by virtue of the judgment of divorce. She was entitled, therefore, to the relief granted. It is said that neither the evidence nor findings show that the defendant *Henry Heady* had any such interest in the sheriff's certificate or in the land, when this action was brought, as amounted to the setting up of a claim thereto, within the meaning of the statute. It is very clear that he did not, in his answer, disclaim all title to the land and certificate and offer to give a release, as he should have done if he was not setting up some claim thereto. But really the sheriff's certificate was issued to him, and, although he assigned it to his father just before the suit was commenced, this assignment was kept secret from the plaintiff and her attorneys. Besides, the evidence shows beyond all controversy that the sheriff's certificate was entirely under his control all the time. The circuit court finds that the assignment was made by him to avoid the consequences of this action, which he expected would soon be brought, and that conclusion is fully warranted by the evidence.

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We think the judgment of the circuit court was correct and must be affirmed.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied December 23, 1885.

HEILBRONNER, Assignee, etc., Respondent, vs. LEVY, Appellant.

December 1—December 23, 1885.

Supplementary proceedings: Discretion: Appeal.

The order and scope of the examination of a judgment debtor in a proceeding supplementary to execution are largely in the discretion of the judge or commissioner before whom such examination is being taken; and this court will not interfere and limit such examination unless it clearly appears that there has been an abuse of discretion in requiring the debtor to answer improper interrogatories.

APPEAL from the Circuit Court for *Milwaukee* County.

The opinion states the case.

For the appellant there was a brief by *Geo. B. Goodwin*, attorney, and *Frisby & Gilson* and *W. H. Austin*, of counsel, and oral argument by *Mr. Gilson.*

For the respondent there was a brief by *Wallber & Schram*, and oral argument by *Mr. Schram.*

LYON, J. The plaintiff's assignor, Leopold Wirth, recovered a judgment against the defendant in an action before a justice of the peace, and filed a transcript thereof with the clerk of the circuit court. An execution upon the judgment was thereupon issued out of the latter court, and in due time was returned by the sheriff wholly unsatisfied. Wirth then assigned the judgment to the plaintiff, who in-

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stituted a supplementary proceeding before a court commissioner, who issued an order requiring the defendant to appear before him and answer concerning his property. The defendant appeared as required, and made some purely technical objections to the proceeding, which were properly overruled. He was then examined. This examination disclosed that he was the vice-president and superintendent and a director of a manufacturing corporation, and that he owned one share of the capital stock thereof. The following question was propounded to him by the plaintiff: "Do you know whether the company has made a profit or not during the last year?" The interrogatory was objected to. The commissioner overruled the objection, and directed the defendant to answer; but, under the advice of counsel, he refused to do so. Thereupon the commissioner certified the whole matter to the circuit court for its action thereon. The circuit court thereupon made an order (from which the defendant appeals) adjudging him in contempt, and requiring him, under penalty of punishment, to answer the interrogatory which he had refused to answer, and to pay certain specified costs of the proceeding against him. The correct practice in such cases seems to have been pursued, and, if the question propounded to the defendant was a proper one, the order should not be disturbed.

The order and scope of the examination of a judgment debtor in a proceeding supplementary to execution are largely in the discretion of the judge or commissioner before whom such examination is being taken. This is necessarily so, because, if the debtor has concealed property which is sought to be discovered, he is called to testify against his supposed interest, and will always give his testimony reluctantly. Unless a comprehensive and searching examination be allowed, an artful debtor might defeat the discovery sought. To apply to such an examination the strict technical rules governing the examination of a witness

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on the trial of a cause, or even the less strict rules applicable to a cross-examination, which it more nearly resembles, would be to impair greatly the efficiency and usefulness of the remedy intended to be given by the proceeding, and, in many cases, to destroy it entirely. Hence this court will not interfere and limit such an examination, unless it is made to appear, very clearly, that there has been an abuse of discretion by the examining officer in requiring the judgment debtor to answer improper interrogatories. *Cleveland v. Burnham*, 60 Wis. 16, and cases cited.

It is sufficient to say that we have here no such case. The question, which the defendant was adjudged to be in contempt for refusing to answer, had a bearing upon the value of the stock owned by the defendant in the manufacturing company, and that was a proper subject of inquiry. True, there may have been a more direct way of ascertaining such value, but we cannot say the commissioner abused his discretion by allowing the judgment creditor to resort in the first instance to indirect proof of the fact. There may have been circumstances within the observation of the commissioner which rendered this course of examination eminently proper. We find nothing in the record which calls for the interference of this court.

By the Court.— Order affirmed.

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HAYWOOD and another, Appellants, vs. THE LINCOLN LUMBER COMPANY and others, Respondents.

December 2 — December 23, 1885.

CORPORATIONS. *(1) Receiver. (2) Insolvency: Directors and officers securing preferences. (3) Officers are trustees. (4) Mortgage to directors void.*

1. Where the property of a corporation is being mismanaged, and is in danger of being lost to the stockholders and creditors through the collusion and fraud of its officers and directors, a receiver may be appointed.
2. The directors and officers of an insolvent corporation are trustees for the creditors and must manage its property and assets with strict regard to their interests; and if they are themselves creditors, while the insolvent corporation is under their management they cannot secure to themselves any preference or advantage over other creditors.
3. The directors and officers of a corporation have no right to use their official position for their own benefit, to the injury of others in equal right.
4. The directors or officers of a corporation cannot mortgage or convey the corporate property to themselves.

APPEAL from the Circuit Court for *Lincoln* County.

Action to foreclose a mortgage given by the *Lincoln Lumber Company* to *Murray Haywood* and *George Haywood, Jr.*, the plaintiffs and appellants, and *T. P. Mathews* and one George C. Smith. The plaintiffs and *Mathews* and Smith were, at the time the mortgage was given, directors of the lumber company, *Mathews* being also the president, and *George Haywood, Jr.*, being the secretary and treasurer, of the company. Before the commencement of the action Smith sold and transferred his interest in the mortgage to *Murray Haywood*. *Mathews*, refusing to join as one of the plaintiffs, was made defendant, and afterwards answered disclaiming any interest in the mortgage. Other facts will sufficiently appear from the opinion.

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For the appellants there were separate briefs by *Pullings, Hoyt & Holway*, attorneys, and *David S. Ordway*, of counsel, and the cause was argued orally by *Mr. Ordway*. They contended, *inter alia*, that the mere fact that creditors of a corporation stand in a fiduciary relation thereto does not prevent their taking security to themselves as individuals, to secure an actual *bona fide* loan of money before made to such corporation and used by it in prosecuting its legitimate business. *Duncomb v. N. Y., H. & N. R. Co.* 84 N. Y. 190, 199; *S. C.* 88 id. 7–9; *Smith v. Lansing*, 22 id. 520; *Harts v. Brown*, 77 Ill. 226; *Stratton v. Allen*, 16 N. J. Eq. 229; *Smith v. Skeary*, 47 Conn. 47, 54; *Twinlick Oil Co. v. Marbury*, 91 U. S. 587; *Whitewell v. Warner*, 20 Vt. 444–5; *Gordon v. Preston*, 1 Watts, 388; *Revere v. Boston Copper Co.* 15 Pick. 363; *Hotel Co. v. Wade*, 97 U. S. 23; *Stark v. Coffin*, 105 Mass. 328; *Credit Asso. v. Coleman*, L. R. 6 Ch. 558; *Troup's Case*, 29 Beav. 353; *Hoar's Case*, 30 id. 225; *Buell v. Buckingham & Co.* 16 Iowa, 292–6; *Ashurst's Appeal*, 60 Pa. St. 313, 314; *Hallam v. Indianola Hotel Co.* 56 Iowa, 178; Angell & Ames on Corp. (11th ed.) 219, sec. 233, and note 4. Even if insolvent the corporation could prefer certain creditors. It had the same power in that respect as an individual. *Blunt v. Walker*, 11 Wis. 350; *Rockwell v. Elkhorn Bank*, 13 id. 653; *Stratton v. Allen*, 16 N. J. Eq. 233; *Dana v. Bank of U. S.* 5 Watts & S. 245–8; Angell & Ames on Corp. 171–2, sec. 191; *Whitewell v. Warner*, 20 Vt. 444–5; *Ringo v. Biscoe*, 13 Ark. 575. There was no jurisdiction to appoint a receiver. "The general jurisdiction of equity over corporate bodies does not extend to the power of dissolving the corporation or of winding up its affairs and sequestrating the corporate property and effects, in the absence of express statutory authority." High on Receivers, 182–3, sec. 288; *Waterbury v. M. U. Exp. Co.* 50 Barb. 157; *Strong v. McCagg*, 55 Wis. 624–7. There is no such statutory authority in this state and the

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whole proceeding in the Clark suit was therefore void. See *French Bank Case*, 54 Cal. 480; *Bateman v. Superior Court*, id. 285.

For the respondents there was a brief by *Silverthorn, Hurley & Ryan*, and oral argument by *Mr. Hurley* and *Mr. Ryan*. They argued, among other things, that the directors of an insolvent corporation while it is under their management hold the position of trustees of its assets for the benefit of creditors, and, if themselves creditors, cannot secure to themselves any preference or advantage over other creditors. Morawetz on Priv. Corp. secs. 579–581; id. p. 544, note 1; *Marr v. Bank of Tenn.* 4 Coldw. 471, 484; *Bradley v. Farwell*, 1 Holmes, 433; *Koehler v. Black R. Falls Iron Co.* 2 Black, 715; *Curran v. Arkansas*, 15 How. 306; *Richards v. N. H. Ins. Co.* 43 N. H. 263. Apart from the question of insolvency, the directors of a corporation must exercise the powers conferred upon them solely in the interest of the corporation; they have no authority, under any circumstances, to use their official position for their own private benefit. Morawetz on Priv. Corp. secs. 243–4; *Hoyle v. P. & M. R. Co.* 54 N. Y. 314; *Corbett v. Woodward*, 5 Sawy. 403; *E. & N. A. R. Co. v. Poor*, 59 Me. 277; *G. L. R. R. Co. v. Magnay*, 25 Beav. 586; 1 Perry on Trusts, secs. 194, 197, 207; *Cook v. Berlin Woolen Mill Co.* 43 Wis. 434; *Pickett v. School District*, 25 id. 553; *In re Taylor Orphan Asylum*, 36 id. 552–3; 1 Story's Eq. Jur. sec. 258. The directors could not act both for the corporation and for themselves. *E. & N. A. R. Co. v. Poor*, 59 Me. 279; 1 Perry on Trusts, sec. 207; Morawetz on Priv. Corp. sec. 245; *Walworth Co. Bank v. Farmers' L. & T. Co.* 16 Wis. 629; *Pickett v. School District*, 25 id. 553; *Cumberland C. & I. Co. v. Sherman*, 30 Barb. 553. It is no exception to this rule although all the mortgagees were not members of the board of directors; or that those who were members were a minority of the board. *People v. Board*, 11 Mich.

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222. See, also, *United Brethren Church v. Vandusen*, 37 Wis. 54; *Butts v. Wood*, 37 N. Y. 317; *Supervisors v. Hall*, 47 Wis. 208. The title of the receiver to his office cannot be questioned collaterally. *In re Day*, 34 Wis. 638. The receiver is an officer of the court, and not a trustee. *King v. Cutts*, 24 Wis. 627; High on Receivers, sec. 1 and cases cited. The bank having loaned him money, upon a mortgage, upon the existing evidence of his official authority, the rule is applicable that the acts of an officer *de facto* are valid so far as they affect the rights of third parties, who have paid a valuable consideration therefor. The court had jurisdiction to appoint the receiver under the circumstances. Morawetz on Priv. Corp. secs. 399–402; *Gibbs v. G. & C. R. Co.* 12 Am. & Eng. R. Cas. 425; High on Receivers, sec. 750 *et seq.; Stevens v. Davidson*, 18 Grat. 819; *Ruggles v. S. Minn. R. Co.* 5 Chic. Leg. News, 116; *Dumville v. Ashbrooke*, 3 Russ. 98; *Ver. & C. R. Co. v. V. C. R. Co.* 46 Vt. 792; *Featherstone v. Cook*, L. R. 16 Eq. 298; Jones on Railroad Securities, sec. 483; *Waterbury v. M. U. Exp. Co.* 50 Barb. 158; *Rochester v. Bronson*, 41 How. Pr. 78; *Belmont v. Erie R. Co.* 52 Barb. 637; *Robinson v. A. & G. W. R. Co.* 66 Pa. St. 160; *Kelley v. Trustees of A. & R. R. Co.* 58 Ala. 489; *St. Louis & S. C. & M. Co. v. Edwards*, 103 Ill. 472; *Evans v. Coventry*, 5 DeG., M. & G. 911; 3 Pomeroy's Eq. Jur. 363, note 5.

ORTON, J. This is an action brought by the appellants to foreclose a mortgage given by the defendant lumber company, by its president and secretary, to the said appellants and the defendant *T. P. Mathews* and one George C. Smith, on the 4th day of February, 1884, on all of the real property of said corporation, to secure a bond in the penal sum of $100,000, given at the same time by said company to said mortgagees, conditioned to pay them certain indebtedness of the company past due them, respectively, in the

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aggregate of over $50,000. The interest in said mortgage of said George C. Smith was assigned to said plaintiffs. The defendant *Robert E. Parcher* was appointed receiver in April, 1884, in a suit of one J. C. Clark against said company; and said *Parcher*, as such receiver, in June, 1884, borrowed of the defendant the *First National Bank of the City of Wausau* the sum of $10,000, to be used in the management of the business and property of said lumber company; and, by the order and leave of the court, executed, as such receiver, a mortgage upon the real property of said company to said bank to secure the same. The said defendant *Parcher* and the defendant the *Lincoln Lumber Company* answered the complaint, alleging, substantially, that the said mortgage sought to be foreclosed was executed by the president and secretary of said company, without authority; and that, at the time, said corporation was insolvent, to the knowledge of said mortgagees, and owed large indebtedness to others; and that said mortgage was given by said officers, and authorized, if at all, by the directors of said company to be given to themselves, to secure their own claims against the company, as an unlawful and fraudulent preference of themselves as the creditors of the company, in fraud and with intent to defraud the other creditors and the company, and that said bond and mortgage were therefore void. The said defendant the *First National Bank* answered, setting up its mortgage by the receiver, and alleging its priority to the mortgage in suit by the agreement of the mortgagees in said mortgage, and prays a foreclosure thereof.

The circuit court substantially held that said mortgage was given without authority, because the majority of the quorum of the directors voting that said bond and mortgage be given were interested in the same, and that said company was then insolvent; and that the directors held the property in trust for the creditors, and the execution of said

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mortgage by the officers and by the authority of the directors to themselves to secure their antecedent claims against the company was an unlawful preference, and was fraudulent and void; and that the said mortgage to the bank has priority, and was lawfully executed by said receiver. The special findings are numerous, and the case voluminous; but the above are believed to be substantially the findings, and upon the substantial issues in the case.

The principles involved in this suit are really very simple, and almost elementary, and not at all complicated; and we cannot but think they have been greatly magnified and more earnestly contested on account of the amount in controversy. The plaintiffs contest the power of the receiver, *Parcher*, to give the mortgage to the bank on the ground of the want of jurisdiction of the court to appoint him or any one receiver in the case of Clark against the company. These plaintiffs were directors of the company, and one of them the secretary, and both mortgagees, when the said *Parcher* was appointed such receiver, and as directors and as mortgagees counseled and advised his appointment, and consented thereto, and the directors over and over again recognized and confirmed it by dealing with him as such, and placing the property of the company in his hands; and, after his appointment, the plaintiffs, together with the defendant *Mathews*, as said mortgagees, by writing under seal, authorized the said receiver to borrow not exceeding $15,000, and give a mortgage on the property of the company in his hands to secure it, for the purpose of carrying on the business in running the mills and sawing up the logs, and released their said mortgage so far as it would have preference of the mortgage so given by the receiver, and so as to give the same priority to their said mortgage. There is abundant evidence of the plaintiffs' estoppel to dispute the authority of said receiver, both *in pais* and by deed. But accepting the allegations of the complaint in that case as

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true, the court not only had the power, but it was its duty, to appoint a receiver. The directors and officers had given the mortgage in suit alleged to be in fraud of the creditors of the company, nearly or quite insolvent at the time, and threatened afterwards to sell out in gross all the property of the company without notice, and to bid the same off in their own names and for their own benefit, in fraud of many other creditors of the company, and in this way to close up the business of the company. These are some of the substantial allegations of the complaint of Clark, the plaintiff, who was himself one of the stockholders of the company. Within the general powers of a court of chancery, which are preserved in the fifth subdivision of sec. 2787, R. S., this was a proper case for an injunction and receiver both. The property of the company was being mismanaged, and was in danger of being lost to the stockholders and creditors through the collusion and fraud of its officers and directors. The only place of safety for the business and property of the company was in the "hand" of the court through a receiver *pendente lite*. A stronger case for a receiver could scarcely be made, and the numerous authorities cited in the able brief of the learned counsel of the respondents, and the facts stated in the complaint, abundantly authorize and justify his appointment in that case. We think the circuit court properly held that the court had jurisdiction to appoint *Parcher* a receiver; and, upon the evidence, properly found that the mortgage to the bank was not only valid, but has priority over the mortgage in suit. Under repeated decisions of this court, the exceptions of the respondent cannot be considered, except to support the judgment rendered, unless the respondent also appeal. Therefore this court cannot go further than the circuit court in ordering a foreclosure of the bank mortgage in this action.

But the matter of this bank mortgage is of only incidental importance in this case. The main question is of the valid-

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ity of the mortgage in suit. There was abundant evidence to justify the finding of the circuit court that at the time it was given the company was insolvent. In such case, the authorities seem to be uniform that the directors and officers of the corporation are trustees of the creditors, and must manage its property and assets with strict regard to their interests; and, if they are themselves creditors, while the insolvent corporation is under their management they cannot secure to themselves any preference or advantage over other creditors. The directors are then trustees of all the property of the corporation for all of its creditors, and an equal distribution must be made, and no preference to any one of the creditors, and much less to the directors or trustees, as such. I have carefully examined all the authorities cited on both sides touching this principle, and find it recognized in every case. Many of the authorities cited by the learned counsel of the appellants as holding a contrary doctrine state this doctrine as fully established, and cite many of the authorities in its favor cited here by the learned counsel of the respondents, and cases are made an exception only because, in their facts, this principle has no application. It is reiterated in the text of elementary works, and numerous cases are cited to sustain it. Morawetz on Priv. Corp. secs. 579–581. A few only of the cases holding this principle will be cited here, but many others may be found in the brief of counsel and elsewhere too numerous for citation. *Marr v. Bank of Tenn.* 4 Coldw. 471, 484; *Koehler v. Black R. Falls Iron Co.* 2 Black, 715; *Curran v. Arkansas*, 15 How. 306; *Richards v. N. H. Ins. Co.* 43 N. H. 263; *Bradley v. Farwell*, 1 Holmes, 433; *Drury v. Cross*, 7 Wall. 299; *Paine v. L. E. & L. R. Co.* 31 Ind. 353; *Gas Light Co. v. Terrell*, L. R. 10 Eq. Cas. 168. I have been unable to find a single case, which in its facts is like this, in which this doctrine is even questioned and was not strictly applied.

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But there is another principle equally unquestionable which renders the mortgage in suit void. The directors and officers made the mortgage, or directly caused it to be made, to themselves. They occupied a fiduciary relation to the corporation, its stockholders, and its creditors, and they had no right to use such relation and their official position for their own benefit, to the injury of others in equal right. This principle was applied to the taking of a mortgage by the directors on the property of the corporation to secure their liability as sureties upon a note of the corporation, in *Corbett v. Woodward*, 5 Sawy. 403, which is a strong case; and very similar is the case of *Koehler v. Black R. Falls Iron Co. supra.* See, also, Morawetz on Priv. Corp. 243; *Hoyle v. P. & M. R. Co.* 54 N. Y. 314; *E. & N. A. R. Co. v. Poor*, 59 Me. 277; *Butts v. Wood*, 38 Barb. 188; *Y. & N. M. R. Co. v. Hudson*, 19 Eng. L. & Eq. 365; *Scott v. Depeyster*, 1 Edw. Ch. 513; and *Verplanck v. Mercantile Ins. Co.* id. 85; *G. L. R. R. Co. v. Magnay*, 25 Beav. 586; 1 Perry on Trusts, § 194, and cases cited. But it is really unnecessary to cite cases from abroad when the same principles have been established in our own cases, as in *Cook v. Berlin W. M. Co.* 43 Wis. 434, and *Pickett v. School District*, 25 Wis. 553.

Directors, officers, and agents, and other like trustees, cannot mortgage or convey to themselves any more than one can contract with himself. The idea that the same persons constitute different identities of themselves by being called directors or officers of a corporation, so that, as directors or officers, they can convey or mortgage to or contract with themselves as private persons, is in violation of common sense. *In re Taylor Orphan Asylum*, 36 Wis. 552, and cases above cited. See 1 Perry on Trusts, § 207, and Morawetz on Priv. Corp. § 245; *Walworth Co. Bank v. Farmers' L. & T. Co.* 16 Wis. 629; *Cumberland C. & I. Co. v. Sherman*, 30 Barb. 553.

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It is unnecessary to decide the question whether there was a quorum of disinterested directors that directed the mortgage to be given. The mortgage is an *entirety*, and it makes no difference how many persons are severally interested in it as mortgagees. If such mortgagees, as directors, authorized it, they authorized an act in which they were all jointly interested. They may not have been joint creditors, but they are joint mortgagees, because the mortgage as a security is an entirety. Whether, in this view, the mortgage was never authorized to be given by the president and secretary of the company, by the company through its directors, it may not be necessary to decide; but it seems to me rather illogical to say that, because there is a quorum of directors who are creditors severally, a majority of them may authorize their claims to be secured by one mortgage, and do not act on their own claims, but each one acts in respect to the claims of the other. If A., B., and C. are several creditors and a quorum of directors, and A. and B. vote to give C. an interest in the mortgage to secure his claim, A. and C. so vote as to the claim of B., and B. and C. as to the claim of A.,—do they not vote for themselves in respect to one mortgage? This would be an ingenious and convenient collusion to vote to themselves all the property of the corporation at almost any time, on the ground that the majority so voting is disinterested and impartial.

But it is very clear to us that the mortgage is void in view of the above principles, and that disposes of the action of foreclosure. Beyond that, the findings of the court are not very important as to the rights of the defendants.

By the Court.—The judgment of the circuit court is affirmed.

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HICKEY and another, Respondents, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

December 2 — December 23, 1885.

Verdict must be based on evidence.

A verdict which is the result of mere conjecture, and is not founded upon evidence, cannot be sustained.

APPEAL from the Circuit Court for *Sauk* County.

In February, 1883, the plaintiffs shipped over the railroad of the defendant company two car-loads of potatoes from Lyndon, in Juneau county, to Chicago. The cars were fitted up by the plaintiffs, with a bin in each end, so constructed as to admit the circulation of air under and on all sides of them. A stove was placed in the center of each car, and one of the plaintiffs went with the cars to Chicago, and kept fires in both stoves during the transit. There were very nearly 800 bushels of potatoes so shipped, and, by special contract, the shipment was at the risk of the plaintiffs.

The cars reached Milwaukee in due course of transportation, and, while standing on a side track preparatory to being attached to the proper train for Chicago, or while being so attached, they were run against by a locomotive, with sufficient violence to break down two of the bins,—one in each car,—so that the potatoes ran into the center of the cars, overturning one of the stoves and breaking it, and so injuring the bins that the circulation of warm air about them was impeded. The defendant's employees at once repaired the bins, and righted up the damaged stove, so that a fire could be kept in it, and the cars were sent to Chicago and reached there without delay.

At Chicago it was found that some of the potatoes in both cars were frozen. They were assorted by the commission men employed by the plaintiffs to sell them, and the sound potatoes were weighed and sold. A shrinkage of fifty-two

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bushels was disclosed by such weighing. Had there been no frozen potatoes in the cars, they would have sold for eighty-five cents per bushel, but because some were frozen, and an assorting was necessary, they only sold at an average price of seventy cents per bushel.

The plaintiffs claim that the freezing was occasioned by the injury to the bins in Milwaukee, and that such injury was caused by the negligence of the defendant's servants and employees. They brought this action to recover the damages resulting from such negligence. They itemized their claim as follows: Loss of fifty-two bushels, at eighty-five cents, $44.20; depreciation in the value of those not frozen, 744 bushels, at fifteen cents, $111.60; damage to stove, $6; total, $161.80; less five per cent. commission on $44.20, being $2.21; amount of claim, $159.59.

No question arises on the pleadings. The jury found specially that twenty-six bushels of the potatoes were frozen in transit through the negligence of the defendant, and that the balance found in a frozen condition at Chicago were frozen when they were put into the cars at Lyndon. They assessed the plaintiffs' damages at $81.75. A motion on behalf of the defendant for a new trial was denied, and judgment for the plaintiffs was entered pursuant to the verdict. The defendant appeals from the judgment.

For the appellant there was a brief by *John W. Cary*, attorney, and *H. H. Field*, of counsel, and oral argument by *Mr. Field.*

For the respondent the cause was submitted on the brief of *R. P. Perry.*

Lyon, J. In November preceding the shipment to Chicago, the plaintiffs deposited in a cellar at Lyndon about 575 bushels of potatoes. While there, more than 100 bushels of them were frozen. One of the plaintiffs so testifies. Out of this lot about 450 bushels were shipped on the two cars

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in question. Those thus shipped were taken from the portion of the piles and bins least frozen, but the testimony fails to show that any sufficient care was taken to assort the frozen from the sound potatoes. Both plaintiffs testified that they shipped none but sound potatoes. The jury disbelieved this testimony, and found, in effect, that one half of those found frozen in Chicago were in that condition when they were shipped from Lyndon. In view of the verdict it will be more charitable to construe the testimony of the plaintiffs, which is so positive in form, as the expression of an opinion, rather than the assertion of a fact. But, if so construed, still the jury have rejected their opinion.

It is therefore a verity in the case that the plaintiffs shipped from Lyndon a large quantity of frozen potatoes, intermingled with those not frozen. In round numbers, six per cent. of the shipment was found frozen at Chicago. The jury found that three per cent. thereof was frozen at Lyndon before shipment, and the remaining three per cent. at Milwaukee, or between that point and Chicago, by reason of the negligent breaking down of the bins by the defendant. It will be remembered that the shipment was made at the owner's risk. The defendant was not an insurer, but is only liable for the damages caused by its negligence, and the only negligence alleged is the breaking of the bins.

The difficulty with the verdict is, there is no evidence to support it. We search the record in vain for any testimony tending to show that one half or any other considerable proportion of the mischief to the potatoes was done after the cars containing them reached Milwaukee. The verdict is the result of mere conjecture, which is no sufficient basis for a verdict in any case. Had the jury found that the plaintiffs shipped no frozen potatoes from Lyndon, we should have a very different question to deal with. The testimony is entirely consistent with the theory that all the

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mischief to the potatoes was done before they were shipped. Excluding the testimony of the plaintiffs that the potatoes were all in good condition when shipped (and the verdict does exclude it), the testimony tends very strongly to show that the accident at Milwaukee could not have been the cause of the freezing. It certainly fails to show that it caused the freezing of twenty-six bushels, or any other considerable quantity, of the potatoes. For the reasons suggested there must be another trial.

By the Court.— Judgment reversed, and cause remanded for a new trial.

GRISWOLD, Respondent, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

December 3 — December 23, 1885.

Railroads: Negligence: Starting train before person not a passenger had gotten off.

A person not a passenger got upon a railroad train at a station for the purpose of assisting his wife, who was a passenger, therefrom. His wife had already left the train. The train suddenly started while he was upon the platform of a car, and he was thrown therefrom and injured. Before the train started all passengers for that station had gotten off, and those waiting to take the train had gotten on, and the mail, express matter, and baggage had been put off. How long the train stopped, and whether any signal of starting was given, were matters in dispute. None of the employees of the railroad company knew that he expected to go upon the train or that he had done so; and a brakeman knew that his wife had gotten off the train and needed no assistance. *Held*, that the company was not liable for the injury.

APPEAL from the Circuit Court for *Outagamie* County.

Action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant's servants. The facts are stated in the opinion. The jury

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found a special verdict to the effect (1) that the plaintiff boarded the defendant's passenger train at the time complained of only for the purpose of meeting and assisting his wife, who was a passenger thereon, and not as a passenger; (2) that while upon the steps of the car platform, in the act of leaving the train, he was thrown therefrom by the sudden and violent starting and jerking of the train; (3) that he did not voluntarily step or jump from the car upon the depot platform while the train was in motion; (4) that he was not warned by the brakeman on the train not to step off the car while the train was in motion; (5) that in leaving the car the plaintiff did not fail to exercise ordinary care for his own safety, which contributed to the happening of the injury; (6) that the train did not stop a reasonable length of time; (7) that the plaintiff was injured by a fall from the train of the defendant; (8) that the plaintiff was not guilty of a want of ordinary care in boarding the train, which contributed to the happening of the injury; (9) that the defendant was guilty of a want of ordinary care in starting the train; and (10) that such want of ordinary care on the part of the defendant was the proximate cause of the injury complained of. The jury also assessed the plaintiff's damages at $1,000. Motions by the defendant for judgment in its favor upon the special verdict, and for a new trial, were denied, and from the judgment entered on the verdict in favor of the plaintiff the defendant appealed.

For the appellant there was a brief by *Jenkins, Winkler, Fish & Smith*, of counsel, and oral agreement by *Mr. Jenkins*. They argued, *inter alia*, that in getting upon the train the plaintiff was a mere trespasser. *Gardner v. N. H. & N. R. Co.* 51 Conn. 143; *Batchelor v. Fortescue*, 49 L. T. R. (N. S.), 442. A less degree of care is due to a trespasser than to a licensee. *Delaney v. M. & St. P. R. Co.* 33 Wis.

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67; *Davis v. C. & N. W. R. Co.* 58 id. 662. And a less degree of care is due to a licensee than to one under invitation. *Sweeney v. O. C. & N. R. Co.* 10 Allen, 374; *Hogan v. C., M. & St. P. R. Co.* 59 Wis. 139, 149, 150; *Cahill v. Layton*, 57 id. 600; *Corby v. Hill*, 4 C. B. (N. S.), 556; *Hounsell v. Smyth*, 7 id. 731; *Barnes v. Ward*, 9 C. B. 392; *Hardcastle v. S. Y. R. & R. D. Co.* 4 Hurlst. & N. 67; *Bolch v. Smith*, 7 id. 736; *Vanderbeck v. Hendry*, 34 N. J. Law, 467; *Nicholson v. Erie R. Co.* 41 N. Y. 525. If it be conceded that the plaintiff was a licensee the defendant was not guilty of any want of ordinary care under the circumstances. The train was operated and the business was conducted in the usual manner, and there were no special circumstances calling for more particular care. *Mitchell v. C. & G. T. R. Co.* 51 Mich. 238; *Vanderbeck v. Hendry*, 34 N. J. Law, 472; *Davis v. C. & N. W. R. Co.* 58 Wis. 657; *Hogan v. C., M. & St. P. R. Co.* 59 id. 150; *Lucas v. T. & N. B. R. Co.* 6 Gray, 70; *Sutton v. N. Y. C. & H. R. R. Co.* 66 N. Y. 248.

For the respondent there was a brief by *William Kennedy* and *Gabe Bouck*, and oral argument by *Mr. Kennedy*. To the point that the plaintiff had a right to go upon the train to meet and escort his wife, they cited Thompson on Carriers of Passengers, 49; 2 Rorer on Railroads, 1130, 1131; *Doss v. M., K. & T. R. Co.* 59 Mo. 27; *Langan v. St. L., I. M. & S. R. Co.* 72 id. 392; *Hicks v. Pac. R. Co.* 64 id. 429; *Gillis v. Penn. R. Co.* 59 Pa. St. 129; *McKone v. M. C. R. Co.* 51 Mich. 601; *Lucas v. N. B. & T. R. Co.* 6 Gray, 64; *Gautret v. Egerton*, L. R. 2 C. P. 371; *Holmes v. N. E. R. Co.* L. R. 4 Exch. 254; *Slattery v. Dublin, W. & W. R. Co.* L. R. 3 App. Cas. 1155; *S. C.* Ir. Rep. 8 C. L. 531; 10 id. 256. The train must stop a reasonable time. 2 Rorer on Railroads, 965, 968; Wood on Railways, 1123; Shearm. & Redf. on Neg. sec. 276; *Keller v. S. C. & St. P. R. Co.* 27 Minn. 178.

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Orton, J. The facts in this case are substantially and briefly as follows, according to the testimony of the plaintiff, the respondent on this appeal, and other witnesses: The plaintiff went to the depot at Appleton on the morning of the 16th day of February, 1883, about five minutes before the train of the appellant company arrived, at about 4 o'clock and 32 minutes, to meet his wife, whom he expected would be on the sleeper of said train on her return from New York, and to assist her off the train. The morning was dark and foggy. When the train arrived he got on the first sleeper towards Green Bay and asked the porter of the sleeper if there was a lady to get off, and he said, "May be she is in the next car," and he then walked rapidly out of the car, and as he reached the platform of the car the train suddenly started, and he was thrown off and dragged along by the train, and much injured. His wife, Mrs. Griswold, had got off the train before he went on it, and her baggage had been taken off. The evidence was undisputed, that all the passengers who were to go on said train at that point had gone aboard, and all those who were to stop at that depot had got off, and the mail had been exchanged as well as the express matter, and all the baggage had been taken off, and everything done necessary to be done, so far as the passengers and the business of the company at that place was concerned. How long the train stopped was a matter in dispute on the trial, and whether any signal of starting was given. Neither the conductor, nor any brakeman, nor the engineer, nor any one else having anything to do with the running or management of the train, knew, or had information, that the plaintiff had gone aboard of the train, or that he was expected to go aboard of it at that time, for any purpose, and the brakeman at least knew that his wife was off the train and needed no such assistance.

Such being the facts, the vital question in the case is

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whether the company owed to the plaintiff the duty of keeping the train standing still just at that time long enough so that the plaintiff could have safely left the train. In other words, was the plaintiff placed in such a relation to the company that it was the absolute duty of the company to so withhold the train for him to get off safely at that time? It is not worth while to speculate in such a case as to whether the plaintiff was a trespasser or licensee, or was on the train by invitation, but it may be conceded that he had the right to board the train for the purpose stated. He was not a passenger and the company owed him no duty as such. The company are charged with this single and only act of negligence, namely, that it started its train before the plaintiff could safely step down out of it, and thereby caused him to fall off, and to be so dragged along to his personal injury. The company certainly would not be *absolutely* liable for such an act in respect to the plaintiff unless he was a passenger, of whose presence on the train, and of whose getting on and off, it would be presumed to have notice, and to whom it is bound by contract as well as by duty. Neither the company, nor its employees and servants, in the management of the train, had any notice whatever that the plaintiff was anywhere about the train. Must they not be placed in fault before they can be charged with liability? Must they not know what it is their duty to do in such an emergency, by a knowledge of the emergency itself, before they can be charged morally or legally with a breach of such duty? Negligence, unless constructive and absolute, must depend upon the circumstances of the case, and those circumstances must be such as to create a duty which can be neglected or violated. These propositions would seem to be axiomatic and self-evident. The employees, in the management of this train, knew of nothing which made it their duty to delay the train any longer than to perform their usual duties at

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that depot,—all of which had been performed. Had any of them been informed, or had any reason to know, that the plaintiff was on board one of the cars for the purpose stated, then the company would have owed him the duty to have delayed their train a reasonable time for him to get off. But none of them knew any such thing, or had reason to know it; but, on the contrary, some of them knew that the wife of the plaintiff was already off the train, and that there was no occasion for the plaintiff to go aboard to help her.

The duty of the company in such a case is *relative*, and not *absolute*. It seems to me that the law would work the grossest injustice if it could create a liability of the company in such a case. It would seem to be the first duty of the person entering a train for such a purpose to notify some one in its management of his presence, business, and purpose, so as to create some relation to the company, and make it its duty to care for him. The principle is elementary, in all such cases, that the liability of the company to a person injured by being in such a place of danger depends upon the company's failure to use ordinary care to avoid injuring him after becoming aware of his danger. Shearm. & Redf. on Neg. 36. Even a passenger must give the company notice when he leaves his proper place on the train, in order to create a duty in the company to care for him out of such place. 2 Wood on Railways, 1134, 1135. Where a person not a passenger escorted a lady friend onto the cars, and to find her a seat, returned to the platform, and was thrown therefrom by the motion of the train and injured, he was not allowed to recover, and one reason given was that no one of the employees had any notice of his being on the train. *Cent. R. Co. v. Letcher*, 69 Ala. 106. The court says, in the opinion: "All who were in charge of it [the train] were ignorant that the plaintiff was upon it, and without notice or request to any of them to slow or

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stop the train," etc. In *Keller v. S. C. & St. P. R. Co.* 27 Minn. 178, the duty of holding a train long enough for a passenger to get off, is made to depend upon the presumption that the company knew, and upon the implied notice, that the passenger wanted to get off at that place. In *Gillis v. Penn. R. Co.* 59 Pa. St. 129, the duty of the railroad company was made to depend upon the business relation implying *privity* with the company of the person not a passenger. The case of *Doss v. M., K. & T. R. Co.* 59 Mo. 27, was made to depend upon the neglect of the company to stop at the proper place, and long enough for the lady passenger and her child to get on or off the train, so that her lawful escort was injured by getting off. Having notice of the passenger, the company had the same notice of her escort. The case, as it was, was an extreme one, and in conflict with the current of authority upon the question; but it does not dispense with notice to the company of the presence of the stranger, and the company was guilty of negligence towards its passenger by starting too soon. In *Sutton v. N. Y. C. & H. R. R. Co.* 66 N. Y. 248, it was held that the implied notice of the deceased being on the track, because it was common for persons to cross the track at that place, was not sufficient to make the company owe him any duty to set the brakes or otherwise fasten the cars. In *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626, the liability is placed upon the implied notice to the switchman that the little girl was on the track, because he might have seen her if he had looked, and that it was his duty to have looked to see if any one was on the track. In *Gautret v. Egerton*, L. R. 2 C. P. 374, there was an implied notice by the escort accompanying the passenger, if not actual notice. In this case the plaintiff was alone, and on the cars *clandestinely*, without notice to the company, express or implied. But it would seem unnecessary to accumulate authorities to such an obvious principle.

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In this court there have been numerous cases made to depend upon notice to create duty and liability, where such duty and liability were merely *relative* and not absolute, as in this case. Why should the managers of the train have held it there longer than to do the regular business at that place *for this plaintiff* to get off, when they did not know and had no reason to know that he was on the train? It would be unreasonable and reckless to hold that the company are required to stop their trains just so long at every depot, and that everybody has the right to depend upon the strict performance of this duty. If the train be behind time, that time must be made up or some collision might occur. The time must depend upon the business they are required to do safely with the persons to whom the company owes any duty. Beyond that there is no reason. We regret to reverse the judgment in a case where the questions have been so fully submitted to the jury; but this vital question does not seem to have been specially passed upon by the jury, and it is too important to be allowed to pass unheeded in such a case, where the decision will form a precedent for future cases.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

Goode, Respondent, vs. Barr, imp., Garnishee, etc., Appellant.

December 4—December 23, 1885.

Garnishment.

W. occupied certain land, claiming an interest therein, but the legal title was in B., who sold and conveyed the land to R. for $5,000; $2,000 in cash, and balance on time. B., to settle the claim of W., and to obtain surrender of possession, directed R. to pay her a sum

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not exceeding $1,000, the payment to her to be credited on the deferred payments. R. paid her $300, but no more was paid to her by R. or B., and there was no proof that either of them agreed to pay her any more, or that she agreed to surrender possession of the land, and she in fact retained such possession. *Held*, that B. was not liable as a garnishee of W.

APPEAL from the Circuit Court for *Grant* County.

The following statement of the case was prepared by Mr. Justice TAYLOR, as a part of the opinion:

The respondent brought an action against Mary J. Wilkinson to recover a debt due upon contract, and garnished the appellant, *Frank Barr*. *Barr* answered in the garnishee action, and denied all indebtedness and liability as garnishee. The respondent took issue upon the answer. The issue in the garnishee action was tried in the circuit court by the judge without a jury. Charles Roselip and the appellant were the only witnesses called on the trial. The court found the following facts and conclusions of law: "That on or about the ——— day of ———, 1884, the defendant, Mary J. Wilkinson, was living upon and occupying the N. E. ¼ of section No. 33, in town 3, range 1 W., in said Grant county, claiming some right thereon; that the legal title to said lands was then in the defendant *Frank Barr;* that on said day said *Barr* sold and conveyed said land to said Roselip for the sum of $5,000; $2,000 to be paid March 1, 1885, and the remainder thereafter at a time named, which it is not material to find or state; that said *Barr*, for the purpose of settling the claims of said Mary J. Wilkinson to said lands, and to obtain a peaceable surrender of possession thereof by her, directed said Roselip to pay to her a sum not exceeding $1,000 of the said purchase money, to take her receipt for such money as he might pay her, not exceeding said sum, which receipt said *Barr* would accept as payment made towards such purchase money; that immediately thereafter said Roselip did pay to said Mary J. Wilkinson

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$300 of said sum; that no part of the remaining $700 had been paid by said *Barr* or said Roselip to said Mary J. Wilkinson at the time of the service of the garnishee summons in this action, or to any person for her use; and that a sum then remained unpaid more than the amount claimed or demanded in the garnishee proceedings herein."

And as a conclusion of law the court found "that said Charles Roselip was not indebted to said Mary J. Wilkinson at the time of the service of the garnishee process in this cause, and judgment is hereby ordered discharging said Charles Roselip as such garnishee; and that said *Frank Barr* was indebted to said Mary J. Wilkinson, at the date of the service of said garnishee summons on him, in a sum exceeding the sum of ——— dollars; that is to say, in at least the sum of ——— dollars. And judgment is hereby ordered that said *Frank Barr* pay to said Charles Goode the sum of $86.08, the amount of the judgment recovered by said plaintiff in the principal action against said defendant Mary J. Wilkinson for damages and costs, together with the costs of the plaintiff in this garnishee proceeding."

The appellant excepted to the findings of fact and conclusion of law, and, judgment having been entered in favor of the respondent, *Barr* appealed to this court.

For the appellant there was a brief by *Bushnell & Watkins*, and oral argument by *Mr. Bushnell.*

For the respondent there was a brief by *Carter & Cleary*, and oral argument by *Mr. Carter.*

TAYLOR, J. We think the findings of fact are sustained by the evidence given on the trial, and the only important question in the case is whether such findings sustain the conclusion of law, viz., that the appellant was indebted to Mary J. Wilkinson at the time of the service of the garnishee summons in any amount whatever.

After a careful consideration of the findings of fact, we

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do not think there is any ground for saying that upon such facts there is shown to be any indebtedness on the part of *Barr* to Mrs. Wilkinson. All that is found is that the appellant, *Barr*, authorized Roselip to pay Mrs. Wilkinson a sum not exceeding $1,000 in order to settle her claim to the land and to obtain from her the peaceable surrender of the possession of the lands sold by him to Roselip; that Roselip did pay her $300, and *Barr* sanctioned such payment by Roselip, and credited him for that sum on the contract for the sale of the land.

The test as to whether the garnishee should be held liable to the respondent is whether the facts found, if found in an action between Mrs. Wilkinson and *Barr*, would have entitled her to a judgment against him. To us it seems perfectly apparent that in an action by Mrs. Wilkinson, a complaint stating only the facts found by the court in this case must have been held bad as not stating facts sufficient to constitute a cause of action. To have entitled her to recover, she would have been compelled to allege, under the authority conferred upon Roselip by *Barr*, that Roselip had offered to pay her the sum of $1,000, or some other less sum, for her claim upon said land, and in consideration that she would surrender peaceable possession thereof to said Roselip; that she had accepted such offer, and was ready and willing to perform the agreement on her part, offering to release her claim and surrender the possession. Certainly nothing short of this would have made out a cause of action on her part against *Barr*, and it is probable that, before commencing an action, she would have been compelled to tender a release, and surrender the actual possession to Roselip. Roselip was also a garnishee in this case, and the court discharged him because there was no evidence that he had agreed with Mrs. Wilkinson to pay her any sum of money beyond the $300 he did in fact pay her, and at the same time held the appellant liable on the ground that in some

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way, through the agency of Roselip, he had bound himself to pay Mrs. Wilkinson the $1,000. There is not a particle of evidence in the case tending to show that Roselip ever informed Mrs. Wilkinson of the direction *Barr* had given him in regard to the payment of the $1,000, or that he agreed to pay her any sum other than the $300 paid, or that she ever agreed to release her claim to the land and surrender peaceable possession on being paid such sum, or any other sum. And the fact appeared on the trial that she was still in possession of the house on the land.

The learned counsel for the respondent urges that upon the evidence it is clear that Mrs. Wilkinson could have recovered against *Barr* on the ground that his statement to Roselip was an admission of indebtedness to her of the sum of $1,000. We do not so understand the evidence, and it is evident the learned circuit judge did not so understand it when he made his findings. The utmost that can be said in favor of Mrs. Wilkinson is that Roselip was authorized by *Barr* to offer her $1,000 for a release of all claim to the land and the surrender of the possession; and it is idle to say that she can recover upon this authorized offer without alleging and showing that such authorized offer was in fact made to her by Roselip, that she accepted the offer, and was ready and willing to perform on her part.

We think the court erred in holding that there was anything due from the appellant to Mrs. Wilkinson when the garnishee summons was served.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to the circuit court to enter judgment for the appellant.

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ANDREW, Appellant, vs. SCHMITT and others, Respondents.

December 4 — December 23, 1885.

TRUSTS AND TRUSTEES: FORMER JUDGMENT. *(1) Failure to invest trust fund: Interest chargeable to trustee. (2) Action for breach of trustee's bond: Former judgment. (3) Safety of investment.*

1. Where a trustee is required to invest the trust fund in U. S. bonds or on real estate security, the interest which he might have obtained on real estate security of the proper character is the measure of his liability for a failure to invest the fund.
2. A former judgment in an action upon a trustee's bond for a breach of the condition "that he shall pay all moneys which it shall become his duty to pay as such trustee," by a refusal to pay over certain interest to the *cestui que trust*, is not a bar to another action upon the bond for a breach of the condition to keep the trust fund properly and constantly invested.

[3. Whether a trust for the investment of money "in U. S. bonds or in other safe manner with ample real estate security," does not require that any investment other than in U. S. bonds shall be absolutely safe and the security absolutely ample, and make the trustee an insurer of the fund, both principal and interest, or at least that such other investment shall be as safe as one in U. S. bonds, not determined.]

APPEAL from the Circuit Court for *Grant* County.

Action upon the bond of a trustee, for a breach thereof. The facts are stated in the opinion.

For the appellant there was a brief by *Bushnell & Watkins*, and oral argument by *Mr. Bushnell.*

For the respondents there was a brief by *Carter & Cleary*, and oral argument by *Mr. Carter.*

ORTON, J. It appears that prior to the 4th day of March, 1874, the plaintiff, *Christina Schmitt* (now by subsequent marriage *Christina Andrew)*, and the defendant *Andrew Schmitt*, had been husband and wife, and were divorced, and that, in accordance with the judgment of divorce, there was a division of their property in such manner that the sum of

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$4,200 was left in the hands of said *Andrew Schmitt* in trust for their five children, in shares as follows: To their daughter Louisa, $1,000, and to their four other children, $800 each,—to be paid to them, respectively, as their daughters arrive at the age of eighteen years, and as their sons arrive at the age of twenty-one years. Until such respective portions of said fund are to be so paid it was to be kept by said *Andrew* "constantly invested in United States bonds, or in other safe manner, with ample real estate security, at the best rate of interest he can possibly obtain, with such interest payable annually," which said interest was to be paid by him to the said *Christina Schmitt.* On said 4th day of March, 1874, the said defendant *Andrew Schmitt*, together with the other of said defendants as sureties, executed to the said children, and to said *Christina*, the wife, their bond, in the penal sum of $10,000, conditioned that the said *Andrew Schmitt* keep said fund so invested, and to pay said children when they arrive at such age their respective portions thereof, and to pay said *Christina Schmitt* such interest as aforesaid. In respect to all of said fund, except the sum of $1,950, it was already loaned out on bond and mortgage, and the interest was duly paid, and the principal has been in most part, if not entirely, paid to the children, and no complaint is made. It is only in respect to the sum of $1,950, as part of the fund, and received by the said *Andrew Schmitt* in money, that the breach of the condition of said bond is assigned in this action, that the said *Andrew* had not kept the same "constantly invested in United States bonds, or in other safe manner, with ample real estate security," whereby the plaintiff had lost interest thereon at the rate of ten per cent. per annum, which the said *Andrew* might have obtained.

The answer of the defendants puts in issue the allegation of this breach, and substantially alleges that the said *Andrew*, immediately after the execution of said bond, on

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or about the 27th day of March, 1874, loaned the said fund to one Michael Jacobi at ten per cent. interest, payable annually, and received as security therefor a mortgage of said Jacobi and wife on certain 100 acres of land in Grant county, which was ample security for the payment of both the principal and interest of said loan; and that the interest on said loan was promptly paid by the said Jacobi for the first three years, and the said plaintiff received the same, and the further sum of $120 had been paid to said plaintiff since that time. On failure of the payment of such interest by said Jacobi, in March, 1878, the said *Andrew* caused said mortgage to be foreclosed, and bought in the mortgaged premises for the benefit of the plaintiff and said children at the sum of $1,950, and has since held and leased the same for their benefit, the rents of which have not since reimbursed the said *Andrew* for costs, taxes, expenses, improvements, etc. The good faith of the said *Andrew* in so managing said fund is alleged.

The main issue in the case was, then, the safety of said investment, or the sufficiency of said real estate security at the time said loan was made. The facts of said loan and the payment and nonpayment of the interest, as above stated, were proved on the trial, and there was testimony showing that the investment was not safely made, and that the security by said mortgage was quite inadequate and insufficient when taken by the said *Andrew*, which warranted the jury in so finding. There was testimony that the land was rough and uneven, lying over ridges and in valleys, with less than half broken up for cultivation, and with very poor and cheaply constructed buildings and poor fencing, and was worth in market less than the principal of said loan when said loan was made, and has continued to become worth less and more unproductive ever since. Even under the liberal rule of "good faith and a sound discretion," we think the jury in this case was justified in finding

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that this security was not ample, and that an ordinarily prudent man, knowing the land, would not have considered it ample security for the loan, at the time the mortgage was given, as the jury found by their special verdict. It may not be necessary to inquire whether this trust ought to be governed by this rule, inasmuch as the jury has, upon sufficient evidence, according to this rule, found a breach of the condition of the bond in this respect; but the language "other *safe* manner, with *ample* real estate security," is very strong, and would seem to require the highest degree of care, diligence, judgment, and discretion in making the investment, if not its absolute security.

The trust, so far at least as the principal of the fund is concerned, is for the benefit of infant children, who can neither act for themselves nor be consulted, and it may be that the interest upon its investment is to be used for their support during infancy. The language "in United States bonds, or *other safe manner*," would seem to imply that such *other manner* of investment should be as safe as an investment in United States bonds. At the time the investment is made there should be no doubt or question but that such other manner is absolutely safe, and that the real estate security is ample; and it is not clear that these conditions do not require the other manner to be absolutely safe and the security absolutely ample, and make the trustee an insurer of the fund, both principal and interest, at least equal to its security if the fund had been invested in United States bonds; but this question we need not and do not decide. 1 Perry on Trusts, § 459; Hill on Trusts, §§ 369–371; *Marsh v. Hunter*, 6 Madd. 295; *Wiles v. Gresham*, 24 Law J. Ch. 264. The verdict of the jury in this case, however, as above stated, is supported, under the more liberal rule, by sufficient evidence.

The defendants having been held liable for this breach of duty on the part of *Andrew Schmitt*, the trustee, in so in-

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vesting the fund, by which it has earned no interest and may be lost in whole or in part, it is immaterial to the plaintiff and the children what he has done with the mortgage or land. Having made the investment in violation of the terms of the trust and the conditions of the bond, both the plaintiff and the children have a right to look to the bond alone for their security, both for the principal and interest of the fund. Under the special verdict of the jury, that the fund was not invested in a safe manner with ample real estate security, the questions then were, At what rate of interest could it have been invested during the time of such default, in a safe manner with ample security? or, Should the trustee be chargeable with the interest which would have accrued upon United States bonds had the fund been invested therein, as allowed by the condition of the bond? or, In the absence of any evidence at what rate of interest the fund might have been loaned on ample real estate security, should he be chargeable with the common interest of seven per cent.?

There was once some question whether, in case of an alternative to invest "in stocks or on real estate security," the interest upon the stocks, and the value of the stocks if even above par, should be the criterion of liability. But now it seems to be settled that the interest which might have been obtained on real estate security of the proper character is the measure of liability in such a case. But if this is not ascertained, then the trustee would be chargeable with the common rate of interest and the whole of the principal. Hill on Trusts, § 374 and note 1; and § 379 and note. According to this rule, which we think is the just and correct one in this case, the jury found a general verdict in favor of the plaintiff for the sum of $591, after deducting the said $120, which would be slightly less than the legal interest on the fund for the time past of the default. The verdict will therefore not be disturbed, and this will be the

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true rule hereafter, so long as the fund remains uninvested according to the conditions of the bond.

This disposes of this case so far as the merits are concerned, and there was but little contention on these questions. But the case was finally disposed of, and judgment rendered against the plaintiff of dismissal of her complaint, on the answer and proof of a former judgment in bar. It was alleged as a separate defense that on the 7th day of August, 1878, the said plaintiff brought suit against some of these defendants upon the same bond in the circuit court of the county of Dubuque, state of Iowa, and alleged in her complaint the same breaches of the bond as in this case, and that such allegations were denied, and that thereupon said cause was tried on its merits upon the said issue, and decided against the plaintiff and in favor of the defendants, and judgment so rendered,—which is insisted upon in bar of this action. Upon the record of said case in evidence, the circuit court held that said judgment was a bar to this action, and thereupon set aside said special and general verdicts of the jury, and rendered judgment against the plaintiff as aforesaid. From this judgment the appeal is taken.

The breach assigned in said former action was "that the said *Schmitt* entered upon said trust, received said money, etc., and loaned the same at the rate of ten per cent. interest, or could have done so, and received the interest on the same, etc., but has wholly neglected and refused to pay over the interest to said plaintiff." The answer, after a general denial, was that said money "has been safely invested in good real estate security, and that the interest thereon since said investment has been annually paid to the plaintiff, except the sum of $195, on which the party to whom said $1,950 was loaned has made default in the payment of the interest due in the year 1878, and for which interest said *Schmitt* has now an action pending for the recovery thereof, and, when so recovered, same will be promptly paid to plaintiff."

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This is the only issue in respect to said fund of $1,950, and that most clearly is that *Schmitt* had loaned it at ten per cent. interest, and neglected and refused to pay said interest to the plaintiff. The issue in this case is that he has not kept said fund constantly invested in United States bonds, nor in other safe manner, with ample real estate security. The breach is of different conditions of the bond. In the former suit, it was for the breach of the condition "that he [*Schmitt*] shall pay, or cause to be paid, all moneys which it shall become his duty to pay as such trustee;" and in this suit it is the breach of the condition to keep the fund so constantly invested. The facts shown in evidence in the former action do not appear in the record in this case, and we can only determine what those facts were from the evidence in this case of what they must have been in that suit in order to have warranted a judgment in that case against the plaintiff, and from what evidence would have been pertinent to that issue. These facts were that the money had been loaned to said Jacobi, as stated above, at ten per cent. interest, payable annually, and that such interest had been paid to the plaintiff for the first three years, and that the interest due in March, 1878, had been sued for, and when collected would be paid. There being no time stated in said bond when said interest should be paid, the defendant *Schmitt* was no doubt allowed a reasonable time in which to collect the same; hence as to that year's interest the suit was premature. This was all there was of it, and it is very clear that the issues in the two actions are essentially different; and for that reason the judgment in that case cannot be a bar to this action. *Strong v. Hooe*, 41 Wis. 659; *Lathrop v. Knapp*, 37 Wis. 307; *Hardy v. Mills*, 35 Wis. 141; *Bergeron v. Richardott*, 55 Wis. 129. There could not have been any such issue in that case, because at that time the fund had, so far as then known, been safely invested, and the interest for three years had

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been promptly paid, and for the year 1878 it was in suit and might have been collected, as stated in the answer in that action, and when collected might have been paid to the plaintiff. We think, therefore, that the circuit court erred in holding the judgment in that case a bar to this action, and in setting aside the said verdicts of the jury on the main issues in the case, and in rendering judgment in favor of the defendants.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with direction to render judgment on the general verdict of the jury in favor of the plaintiff for the sum of $591, and interest thereon since the date of the former judgment in the case, together with the costs of the action.

As to investment of trust funds, generally, see 25 Am. Law Reg. 217.—REP.

EVANS, Assignee, etc., Respondent, vs. ENLOE and others, Appellants.

December 4—December 23, 1885.

(1) Admission on trial: Appeal: Estoppel. (2) Right to possession follows legal title: Vendor's lien.

1. Where, on the trial, defendant admitted that a deed and bond offered in evidence did not constitute a mortgage, and, acting on such admission, plaintiff failed to put in certain testimony, and the court directed a verdict for the plaintiff, the defendant cannot, on appeal, claim that the transaction was in fact a mortgage.
2. Land was sold and conveyed absolutely, but by the terms of the deed and of a bond given for the payment of the purchase price, the possession was reserved to the grantor for one year. *Held*, that at the end of the year, in the absence of any provision to the contrary, the right of possession vested in the grantee, although a part of the purchase price remained unpaid.

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APPEAL from the Circuit Court for *Grant* County.

This is an action of ejectment, commenced August 25, 1884. The plaintiff sues as assignee of Isaac Hodges, under a general assignment for the benefit of the creditors of the latter. The defendants are the widow and two of the sons of Enoch Enloe, deceased.

The complaint is in the statutory form. The answer admits that the plaintiff is such assignee, but otherwise is a general denial, and nothing more. On the trial, at the close of the testimony, the court directed a verdict for the plaintiff, to the effect that at the commencement of the action he was the owner in fee simple absolute of the lands described in the complaint, and was entitled to the possession thereof, and that the defendants unlawfully withheld the same from him; and assessed the plaintiff's damages for such unlawful detention at six cents. From the judgment entered thereon the defendants appeal. Other facts are stated in the opinion.

For the appellants there was a brief by *Bushnell & Watkins*, and oral argument by *Mr. Bushnell.*

For the respondent there was a brief by *Carter & Cleary*, and oral argument by *Mr. Carter.*

CASSODAY, J. At the commencement of the trial it was admitted by the defendants that, October 22, 1864, the title to the lands in question was perfect in one Enoch Enloe. Evidence was given on the part of the plaintiff showing that January 11, 1872, Enoch Enloe and wife executed and delivered to Isaac Hodges a warranty deed of the lands in question, which deed was recorded January 12, 1872. Other deeds were given in evidence showing that Hodges had the complete and perfect legal title to the lands, January 11, 1872. The defendants also admitted on the trial that they were in possession of the lands, and that all the title to the lands which ever vested in Isaac Hodges passed to the

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plaintiff by his assignment to him, February 11, 1884. In addition, the plaintiff put in other evidence, tending to show that although Hodges did not fully pay for the land at the time he took the title, yet that he had thereafter paid for the same in money and the use of the land. Among other things, a bond was received in evidence, without objection, given by Hodges to Enoch Enloe at the time he received the deed from him, in the penal sum of $7,000, and reciting the purchase of the farm by Hodges from Enoch Enloe for $7,000, which the latter had caused to be conveyed to him; that said Enloe need "not surrender possession of said lands to said Hodges *until one year from*" the *date* of the bond; that there were liens and incumbrances on said lands in the shape of attachments, judgments, and mortgages to about the sum of $3,000; that Enloe was also owing Hodges a large amount of money; that there were claims against Enloe which Hodges might be compelled by law to pay,—and then providing, in effect, that if Hodges should well and truly pay, on or before one year from its date, all such liens and incumbrances as were then liens upon said lands, and should pay to Enoch Enloe, within the year, all of the remainder of said $7,000, *without interest*, that might remain after paying his own claim, and all such claims as were then liens and incumbrances upon the lands, and all such claims as he might be directed by said Enloe verbally or in writing to pay, and also all such claims not then secured, if any, as he might be required and compelled by law to pay, and all interest thereon, not exceeding in the whole, principal, interest, and costs, $7,000, then the obligation to be void; otherwise of force. There was evidence tending to show that the bond was surrendered up to Hodges by Enloe in 1874, and that Hodges paid taxes on the land.

The defendants gave evidence tending to show that their

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father, Enoch Enloe, was in possession up to the time of his death, and that they, or other members of the family, had been in possession ever since, and paid the taxes; and that the bond had not in fact been surrendered nor fully satisfied. Other evidence was admitted. At the close of the testimony on the part of the defendants, the plaintiff commenced putting in rebutting testimony. Thereupon counsel for the defendants objected, and stated to the court that the transaction was not claimed to be a mortgage. Thereupon the plaintiff's counsel responded that, "with that understanding, we are satisfied." Thereupon the court directed a verdict for the plaintiff as stated. Most of the evidence on the part of the plaintiff was received against the objection of the defendants, seemingly on the theory that the defendants might claim to be in possession as equitable mortgagees, and probably without being fully informed as to the real nature of the issue made by the pleadings.

The learned counsel for the defendants insist that they are entitled to retain the possession against the plaintiff's legal title, on the ground that their father had a vendor's lien on the land for the unpaid balance of the purchase price, and that he retained and never surrendered the possession. As to whether there was any unpaid balance of the purchase price at the time of the commencement of this action, we shall not inquire. It is enough to know that that question was not in issue, and was never tried. Having failed to allege any equitable counterclaim in the answer, the defendants are not in a very good position to claim judgment on the ground that they have established one by proof. The defendants, having stopped any further testimony on the part of the plaintiff, and induced the trial court to direct a verdict as it did, by disclaiming the transaction to be a mortgage, are not in a position to now claim, upon the evidence taken, much of which was against their objection,

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that the transaction was after all, in effect, an equitable mortgage. Having chosen to stand upon a naked legal defense, the case must be determined according to the legal rights of the parties as disclosed by the legal evidence pertinent to the single issue made by the pleadings.

It is said that the deeds to Hodges and the bond back to Enoch Enloe must be construed together as one instrument. So construed, it is claimed Enloe was to retain the possession until the purchase price was fully paid by Hodges. Such, however, is not the construction we put upon them when considered together. The farm was absolutely sold and conveyed, with the possession reserved "until one year from" the date of the deed and bond. This is the only reservation or restriction upon the possession. This being so, at the end of the year the right to the possession followed the legal title, and hence went presumptively to Hodges, and from him to the plaintiff. Sec. 4210, R. S.; *Toomey v. Kay*, 62 Wis. 106. The price of the farm was definitely fixed. At the time of making the deeds, the persons to whom the purchase price was to be paid could not be definitely ascertained. Just how much would be finally coming to Enloe personally after the payment of all his debts was then unknown. Hence the bond was given with the recitals and provisions stated. The bond further assumed that it might be impracticable to pay the full purchase price within the year. Accordingly it expressly provided in addition to what has been stated, "that if any of such claims shall be in litigation at the end of the year, said Hodges shall be permitted to hold on to so much of said $7,000 as shall be sufficient to provide for payment of such contested claims and costs." There is no provision for Enloe holding possession until the whole purchase price should be paid. If the claims were not all paid by Hodges, and there was something still due to the legal representatives of Enoch Enloe,

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over and above all the rents and profits, then it might, perhaps, have been made available in this action against the assignee of Hodges by way of equitable counterclaim. But it is enough here to say that there has been no attempt to make it available according to any established or known rule of practice.

By the Court.—The judgment of the circuit court is affirmed.

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1. A consolidation of actions should not be ordered where it would tend to render the trial protracted and embarrassing. *Winninghoff v. Wittig,* 180
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If an agent has authority to make a contract, but, in doing so, violates his special instructions as to the mere form of the contract, the other party having no notice of such instructions, the principal is bound. *Lawson v. C., St. P., M. & O. R. Co.* 447

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APPEAL.

(A.) *To Supreme Court.*
See APPEALABLE ORDER. ESTOPPEL, 2. JUDGMENT (I.). MANDAMUS, 4. PLEADING, 3. SUPPLEMENTARY PROCEEDINGS.

1. A finding of fact upon a question depending upon the weight of evidence will not be disturbed where the bill of exceptions does not appear to contain all the evidence. *Daskam v. Beemer,* 13

2. Until the judgment is actually rendered and entered and the costs are taxed and inserted therein, the time within which an appeal may be taken does not begin to run. *Board of Sup'rs of Milwaukee Co. v. Pabst,* 244

3. Under sec. 2831, R. S., the trial court may allow exceptions to the findings to be filed and the bill of exceptions to be settled after the time limited therefor has expired. *Ibid.*

4. An order allowing exceptions to the findings to be filed and the bill of exceptions to be settled after the expiration of the time limited, by a county board, plaintiff, on the grounds of a misunderstanding and of forgetfulness and sickness on the part of the district attorney, is *held* not an abuse of discretion. *Ibid.*

5. An order to show cause why the service of a bill of exceptions should not be allowed after the expiration of the time limited, required the proposed bill to be served therewith, and it was so served as early as May 22. On June 6, it was ordered that such service of the bill of exceptions be declared sufficient service, and that the opposite party have until June 13 to serve amendments, and that the bill of exceptions be settled June 15. *Held* that the statutory time for serving amendments (ten days—sec. 2874, R. S.) was not shortened by such order. *Ibid.*

6. Exceptions taken by the respondent cannot be made available for the purpose of reversing or modifying the judgment or any part thereof. *Jones v. Jones,* 301

7. Same point. *Haywood v. Lincoln Lumber Co.* 345

8. When all the facts essential to constitute a mistake are found by the trial court, this court may draw therefrom the inference that there

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was a mistake, although the evidence is not before it and the trial court did not specifically so find. *Cleveland v. Burnham,* 347

9. In the absence of a bill of exceptions showing the contrary, the recita's in an order appealed from will be treated as verities. *Priest v. Varney,* 500

(B.) *From Award of Commissioners of Appraisal.*
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(C.) *From Justices' Courts.*

1. Sec. 3772, R. S., providing for restitution of the amount collected upon a justice's judgment when the same is *reversed* on appeal, does not apply where the amount of the recovery is merely *reduced* in the appellate court. Upon the facts in this case it is *held* that the defendant must bring his action to recover the amount alleged to have been wrongfully collected. *Sutton v. Chapman,* 312

2. If, at the second term after a justice makes return to an appeal, the appellate court continues the case over the term for cause, the appeal is saved, and thenceforth, as regards laches of the appellant, the case stands on the same footing as one originally brought in the appellate court. *Platto v. W. U. Tel. Co.* 341

3. The order for such continuance, whether formally written out on the record or not, is a "special order" within the meaning of sec. 3766, R. S. *Ibid.*

4. The mere fact that the respondent in an appeal from a justice expressed an anxiety to settle the cause and talked to the appellant about such settlement, will not excuse the failure of the latter to notice the cause for trial and bring it to a hearing before the end of the second term after the return of the justice is filed; and upon such failure, the appeal, unless continued by special order for cause shown, must be dismissed. Sec. 3766, R. S. *Comdohr v. Coleman,* 413

5. An order of a justice of the peace requiring a garnishee to pay into court for the benefit of the plaintiff the amount of a judgment against the principal defendant, or in default thereof that judgment be rendered against him, is not a judgment; and upon the reversal of such order on appeal, the amount collected on the judgment subsequently rendered cannot be ordered to be repaid under sec. 3772, R. S. *Eilers v. Wood,* 422

6. Though no objection to the sufficiency of a written complaint was made in the justice's court, yet that question may be raised on appeal by a demurrer *ore tenus.* *Martin v. Atkinson,* 493

APPEALABLE ORDER.

1. An order, made upon a motion to dismiss an appeal from a justice's court, directing that the cause stand upon the calendar until the next term; that the plaintiff have leave in the meantime to tax the costs according to a stipulation of the parties; and that if the defendant pay such costs and otherwise comply with the stipulation the action be dismissed, but that if he fail to do so the plaintiff have leave at the next term to renew his motion to dismiss the appeal,—is not appealable. *Sowards v. Stephens,* 5

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2. An order consolidating two actions is appealable. *Winninghoff v. Wittig*, 180

APPEARANCE. See PRACTICE, 8.

ASSAULT AND BATTERY.

See EVIDENCE, 1.

1. Where the assault and battery complained of were part of one preconcerted affray, evidence of the circumstances of other fights engaged in by the defendants in the execution of their unlawful purpose, is admissible. *Rhinehart v. Whitehead*, 42

2. A person who goes to a place with others with the intent to get up a fight with persons there, may be liable for an assault and battery committed in the execution of that purpose, although he did not actually participate in such assault. *Ibid.*

3. Where the defendant in an action for an assault and battery pleads in justification the burden is upon him to prove such justification. *Ibid.*

ASSESSMENT of taxes. See TAXATION, 8.

ASSIGNMENT.
Of certificate of sale on execution. See EQUITY.
Of cause of action. See PARTIES, 1.
For benefit of creditors. See REPLEVIN, 2. VOLUNTARY ASSIGNMENT.

ATTACHMENT.

1. The property of B., which had been attached in several actions pending at the same time, was sold and the proceeds were in the hands of the sheriff. The actions were prosecuted to judgment and executions were issued. Several of the judgment creditors moved to vacate the attachment of H. which had been first levied upon the property. The motion was, in form, in the action of *H. v. B.* *Held*, that such procedure was effectual to obtain an adjudication of the questions of the validity of such attachment and the priority of the parties in their rights to the proceeds of the property. *Hawes v. Clement*, 152

2. An affidavit for an attachment must state the amount of the defendant's indebtedness to the plaintiff; and if the cause of action be of such a character that the plaintiff cannot know the amount, no attachment founded upon it can be lawfully executed. *Ibid.*

3. An affidavit stating that the defendant is indebted to the plaintiff in an amount specified "as near as this plaintiff is able to determine," is insufficient. *Ibid.*

4. Under subd. 1, sec. 2731, R. S., an affidavit stating that the defendant has absconded from this state, need not further state that he has so absconded to the injury of his creditors. *Ibid.*

5. A chattel mortgage given with the understanding, express or implied, that the mortgagor shall go on selling the property in the usual course of trade and applying the proceeds to his own use, is fraudulent as to his other creditors, and is ground for an attachment. *Anderson v. Patterson*, 557

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6. Where an affidavit for an attachment is made by an agent of the plaintiff, if the required facts are positively sworn to, the agent's means of knowledge need not be stated. *Rice v. Morner*, 599

7. By taking issue upon the allegations of fact in an affidavit for an attachment the defendant admits that the affidavit, if true, is sufficient. *Ibid.*

8. The fact that an insolvent debtor executes to one of his creditors a mortgage to secure a greater sum than he owes to such creditor,—it not appearing on the face of the mortgage that it is given to secure future advances,—is sufficient to sustain a finding that the debtor has conveyed a part of his property with intent to defraud his creditors. *Ibid.*

ATTORNEY AT LAW.

[1. Whether an attorney has a lien upon a judgment when the cause of action was not assignable, not determined.] *Voell v. Kelly*, 504

2. In order to preserve the lien of an attorney upon the judgment in an action, against a settlement made in good faith, notice of his claim must be given. *Ibid.*

3. A settlement effected by the attorney of one party with the opposite party, in the absence of the attorney of the latter, should be closely scrutinized, and will be set aside where there is any appearance of fraud or undue influence. *Ibid.*

BAIL. See COSTS. MILWAUKEE MUNICIPAL COURT. PARTIES, 3.

BAILMENT.

Where one party hires his team and a driver paid by him to another party, to be used in a certain place or for a certain purpose, and while being used in a different place or for a different purpose the team is injured without any negligence of the driver in handling the team, the bailee is responsible for such injury. The driver is not the agent of the owner in the act of obeying the directions of the bailee at a place or in a kind of work not contemplated by the contract of hire. *DeVoin v. Mich. Lumber Co.* 616

BANKS AND BANKING.

See CORPORATIONS, 1, 2.

1. To render a purchaser of stock in a bank liable to the amount of his shares for the debts of the corporation (under ch. 71, R. S. 1858), a formal transfer of such shares to him upon the books of the bank must be shown. *Cleveland v. Burnham*, 347

2. *It seems* that if the books of the bank are lost or destroyed any record or document in connection with or having reference to such transfer, and contemporaneous therewith, would be higher evidence of the entry thereof in such books than mere parol testimony. *Ibid.*

3. Thus, in such a case, the certificate of stock issued to the transferee, or the copy of the list of shareholders filed (under sec. 31, ch. 479, Laws of 1852) with the register of deeds, would be *prima facie* evidence of the entry of the transfer upon the books. The presump-

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tions are that the statute requiring such entry before the issue of a new certificate, was complied with, that the usual course of business was followed, and that everything was done which was essential to vest the title in the purchaser who is in possession of the stock certificate. *Ibid.*

4. The liability of the stockholder to the amount of his shares becomes fixed at the date of the judgment by which it is ascertained that the assets of the bank have been exhausted and that the deficiency exceeds the amount of his stock, and from that date he is liable also for interest on that amount. *Ibid.*

5. A judgment fixing the amount of the claims of creditors of a bank, applying the assets in part payment thereof, and adjudging the stockholders liable to the amount of their stock respectively, was vacated as against a stockholder who had failed to answer, and he was let in to defend. In a judgment subsequently rendered against him he was charged with the costs only from the time of serving his answer. *Held*, not error. *Ibid.*

BASTARDY.

See DIVORCE, 2.

1. In bastardy proceedings the bastard child may not be exhibited to the jury for the purpose of showing by its likeness to the defendant that it is his child. *Hanawalt v. State,* 84

2. The trial court allowed the bastard child to be exhibited in evidence, but ruled that no comments should be made. Upon the argument counsel for the state commented upon certain resemblances between the child and the defendant to which attention had not been called when the child was present. *Held*, that such comments were improper, and, in the absence of any direction to the jury to disregard them, might be ground for the reversal of a judgment against the defendant. *Ibid.*

BILL OF EXCEPTIONS. See APPEAL (A.), 1, 3–5, 9.

BILLS AND NOTES.

See CONTRACTS. CONVERSION, 1. CORPORATIONS, 2. CRIMINAL LAW, 3. DURESS, 3. EVIDENCE, 3. MORTGAGES, 2.

1. If in an action thereon it is shown that a promissory note was obtained by fraud, the burden of proof is upon the plaintiff to show that he is a *bona fide* purchaser for value before due. *Fuller v. Green,* 159

2. A promissory note the consideration of which was the compromise of a fraudulent claim, if the maker has not waived his rights, is void in the hands of any person not a *bona fide* purchaser for value before due. *Ibid.*

3. Where there is fraud in the transaction which forms the basis of consideration for a promissory note, knowledge that another note given for the same consideration is due and that interest on the notes remains unpaid, is not such notice as will affect the *bona fides* of a purchase of the former note. *Patterson v. Wright,* 289

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4. A setoff against the payee of a note cannot be claimed against a *bona fide* purchaser thereof before due, although he had knowledge of such setoff. *Ibid.*

5. An instrument in the form of a promissory note for the payment of "25.00 as per deed. 10 per cent. till paid," is a note for twenty-five *dollars. State v. Schwartz,* 433

BONA FIDE PURCHASER. See BILLS AND NOTES, 1–4. CHATTEL MORTGAGES, 4, 5. VENDOR, ETC. OF LAND, 1.

BOND on sale of land by administrator — Liability of sureties. See ESTATES OF DECEDENTS, 3.

BOUNDARIES.

A party who claims that a quarter-section corner is not a lost corner, but was originally located at a certain place at some distance from where it ought to be, must not only produce evidence tending to show that it was so located, but must establish that fact by a preponderance of the evidence; and if the distance from the proper place is great the evidence should be very clear. *Daskam v. Beemer,* 18

BRIDGES. See HIGHWAYS AND BRIDGES, 6–9. NAVIGABLE RIVERS.

BROTHERTOWN INDIANS.

1. An allotment of a portion of the Brothertown reservation to a member of that tribe under the act of Congress of March 3, 1839, vested in the allottee the whole beneficial interest in the land allotted, and such allotment never having been vacated or set aside, a patent for the same land subsequently issued to certain persons in trust for the Brothertown Indians, under the act of April 20, 1878, is void. *Fowler v. Scott,* 509

2. The commissioners elected under the act of Congress of 1839 to make partition of certain lands among the Brothertown Indians, were required to make a full report showing the name of each person to whom land was allotted and the quantity allotted to each, with the metes and bounds or other definite description of each parcel, and to accompany said report with a map showing the divisions and partitions. In an action affecting the title to a portion of such lands there was offered in evidence a copy of the commissioners' report duly certified by the commissioner of the general land office, together with a map accompanying the same. The map was certified to by the surveyor as having been made for the use of the general land office, but was not signed by the allotment commissioners nor authenticated by the separate certificate of the commissioner of the land office. It corresponded, however, almost exactly with the report, and also contained certain mistakes referred to in an amendatory report. *Held,* that it was sufficiently identified as the map made and returned by the allotment commissioners. *Ibid.*

3. The report of the commissioners, excluding the map, gave the names of the allottees and the number of the lot awarded to each, but did not specify the number of acres in each allotment or give any definite description thereof. The map itself supplied these deficiencies. *Held,* that the map was a part of the report; and

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that where the other portions of the report were silent, an allotment on the map was sufficient to pass the whole equitable title to the allottee. *Ibid.*

4. Evidence that another map of the lands in question, like the one above mentioned but drawn upon a smaller scale and without the names of the allottees thereon, was also connected with the report, having been sent to the land office later, would not have altered or impaired the effect of the larger map as a part of the report, and the exclusion of such evidence, therefore, if error, was immaterial. *Ibid.*

5. The tribal records of the Brothertown Indians, purporting to have been made by the "town clerk," and shown to have been for many years in the office of the town clerk of Brothertown, are held to be *ancient instruments* and, as such, admissible in evidence to show an allotment of lands within their reservation to members of the tribe in severalty, made at a "town meeting" in 1835. *Ibid.*

6. The commissioners elected to make partition of lands among the Brothertown Indians in 1839, allotted one tract to "Hannah Paul," and another to "the wife of Solomon Paul" whose name, in fact, was Hannah Paul. *Held*, that under the circumstances of this case it will not be presumed that there was but one person of that name, or that the allotments were not made to different persons. *Ibid.*

7. *Quære* whether the act of Congress of March 3, 1839 (5 Stats. at Large, 349), put an end to the existence of the *tribe* of Brothertown Indians as such, and whether, if so, the act of April 20, 1878 (20 Stats. at Large, 513), did not restore the tribal functions sufficiently to enable the members of the tribe, as such, to take as beneficiaries of the trust thereby created. *Ibid.*

BURDEN OF PROOF. See ASSAULT AND BATTERY, 3. BANKS AND BANKING, 3. BILLS AND NOTES, 1. BOUNDARIES. BROTHERTOWN INDIANS, 6. CONVERSION, 6. CRIMINAL LAW, 5. RECORDING ACTS, 4. VENDOR, ETC. OF LAND, 4. WILLS, 1.

CARRIERS. See RAILROADS (D.), 5–10, 15.

CAR SERVICE. See TAXATION, 4 (6).

CASES DISTINGUISHED, OVERRULED, ETC.

1. *Att'y Gen. ex rel. Cushing v. Lum*, 2 Wis. 507 (as to practice in *mandamus* cases), distinguished. *State ex rel. Taylor v. Board of Supervisors of the Town of Delafield*, 219

2. *Basse v. Gallegger*, 7 Wis. 442 (as to pleading in action to foreclose a mortgage), distinguished. *Scheibe v. Kennedy*, 564, 570

3. *Campbell v. Packard*, 61 Wis. 88. See No. 5.

4. *Couillard v. Johnson*, 24 Wis. 533 (as to denial of motion for change of venue), overruled. *Meiners v. Loeb*, 343, 346

5. *Curtis v. Supervisors*, 22 Wis. 167; *Orton v. Noonan*, 23 id. 102; *Johnson v. Ashland Lumber Co.* 52 id. 458; and *Campbell v. Packard*, 61 id. 88 (as to extrinsic evidence to correct uncertainty in deed), distinguished. *Meade v. Gilfoyle*, 21, 22

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6. *Ernst v. Nau*, 63 Wis. 134 (as to contingent claims against estates of decedents), distinguished. *Mann v. Everts*, 379

7. *Johnson v. Ashland Lunber Co.* 52 Wis. 458. See No. 5.

8. *Lathrop v. Snyder*, 16 Wis. 293; *Mairet v. Marriner*, 34 id. 582; and *Oliver v. Town*, 28 id. 328 (as to affidavit for attachment), explained and reconciled. *Hawes v. Clement*, 158

9. *Lewis v. Disher*, 32 Wis. 504 (as to presumption of license to enter upon land), distinguished. *Millard v. McDonald Lumber Co.* 626, 629

10. *Mairet v. Marriner*, 34 Wis. 582. See No. 8.

11. *Meincke v. Falk*, 55 Wis. 427 (as to contract for special skill and labor, not within statute of frauds), distinguished. *Hanson v. Roter*, 625

12. *Morrow v. Reed*, 30 Wis. 81 (as to delivery of chattels sold), distinguished. *Hanson v. Roter*, 622, 624

13. *Oliver v. Town*, 28 Wis. 328. See No. 8.

14. *Orton v. Noonan*, 23 Wis. 102. See No. 5.

15. *Pike v. Vaughn*, 39 Wis. 505 (as to delivery of chattels sold), distinguished. *Gill v. Benjamin*, 369

16. *Place v. Langworthy*, 13 Wis. 629, and *Steinart v. Deuster*, 23 id. 136 (as to mortgage of chattels to be consumed by mortgagor), distinguished. *Knapp, Stout & Co. Company v. Deitz*, 31, 34

17. *Snyder v. W. U. R. Co.* 25 Wis. 60, and *Washburn v. M. & L. W. R. Co.* 59 id. 379 (as to damages, when railroad is constructed across land), distinguished. *Munkwitz v. C., M. & St. P. R. Co.* 405, 406

18. *Steinart v. Deuster*, 23 Wis. 136. See No. 16.

19. *Storm v. Adams*, 56 Wis. 137 (as to presumption, from order for publication, of the existence of facts authorizing the same), distinguished. *Manning v. Heady*, 635

20. *Washburn v. M. & L. W. R. Co.* 59 Wis. 379. See No. 17.

CAUSE OF ACTION. See ACTION (A.).

CERTIORARI. See JUSTICES' COURTS.

CHANGE OF VENUE.

1. Ch. 314, Laws of 1883, was never enacted by the legislature, and hence is not a law. *Meracle v. Down*, 323

2. Under sec. 2621, R. S., the right of the defendant to a change of venue when the county designated in the complaint is not the proper place of trial, is absolute if the demand and motion therefor are duly made. The court cannot retain the cause on the ground that the convenience of witnesses and the ends of justice would be promoted thereby. *Couillard v. Johnson*, 24 Wis. 533, overruled. *Meiners v. Loeb*, 343

3. When the place of trial of an action is changed, the clerk of the court to which the papers are sent is under no legal duty to file them unless the prescribed fees are paid; and if, because such fees

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are not paid, the papers are not filed within twenty days from the making of the order changing the place of trial, such order will be deemed vacated, under sec. 2627, R. S. A custom of the clerk not to exact the fees in advance, but to charge them to the attorneys of the party obtaining the change, will not alter the rule. *Mantz v. Werner*, 408

[4. Whether the time for the transmission of the record can be enlarged, after its expiration, by an *ex parte* order, is not determined.] *Ibid.*

CHATTEL MORTGAGES.

See ATTACHMENT, 5.

1. A mortgagee of chattels which are insured by a policy providing that the loss shall be payable to him as his interest may appear, is entitled to the insurance money to the amount of the mortgage debt, as against creditors of the mortgagor garnishing the insurance company after a loss, although the mortgage was not properly filed. *Manson v. Phœnix Ins. Co., Garnishee*, 26

2. The description of property in a chattel mortgage as "Forty-one Berkshire hogs and sixty-five grain-sacks," is not so uncertain as to invalidate the mortgage. *Knapp, Stout & Co. Company v. Deitz*, 31

3. A mortgage of chattels furnished by the mortgagee to the mortgagor and to be used and consumed by him for the benefit of the mortgagee, is not void as to the creditors of the mortgagor. *Place v. Langworthy*, 13 Wis. 629, and *Steinart v. Deuster*, 23 id. 136, distinguished. *Ibid.*

4. Where domestic animals are mortgaged during the period of gestation, the offspring when born will, as between the parties to the mortgage, be covered thereby; but as against a *bona fide* purchaser or incumbrancer acquiring his title or lien without notice of the facts and after the period of nurture has passed, such offspring will not be covered by the mortgage. *Funk v. Paul*, 35

5. One who takes a mortgage of chattels to secure a pre-existing debt which is not yet due, and without any new consideration, is not entitled to protection as a *bona fide* purchaser or incumbrancer. *Ibid.*

6. If the mortgagee of personal property, with full knowledge that the same has been sold by the mortgagor for its full value, accepts the money realized from such sale and credits the amount on the mortgage debt, he is estopped from thereafter asserting any right to such property under the mortgage. *Field v. Doyon*, 560

CIRCUMSTANTIAL EVIDENCE. See INSTRUCTIONS TO JURY.

CITIES. See MUNICIPAL CORPORATIONS. TOWNS, 1.

CLAIMS.
Against deceased persons. See ESTATES OF DECEDENTS. PARENT AND CHILD.
For injuries on highway, etc. See HIGHWAYS AND BRIDGES, 5-9. TOWNS, 2.

CLERK OF COURT. See CHANGE OF VENUE, 3.

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CLOUD UPON TITLE. See EQUITY.

COLLATERAL SECURITY. See CONTRACTS, 5. CONVERSION, 1.

COMMENCEMENT of action. See LIMITATION OF ACTIONS. SERVICE BY PUBLICATION.

COMMON CARRIERS. See RAILROADS (D.), 5–10, 15.

COMPLAINT. See ACTION (E.) APPEAL (C.), 6. CONVERSION, 4, 5. CRIMINAL LAW, 2. DOGS. INSURANCE, 2, 4. MILWAUKEE MUNICIPAL COURT, 2. MORTGAGES, 3. PLEADING, 2, 5. PRACTICE, 1. PUBLIC LANDS, 3. SERVICE BY PUBLICATION, 2. SLANDER AND LIBEL, 1, 3.

CONDEMNATION OF LAND. See RAILROADS (B.).

CONFLICT OF LAWS. See CONTRACTS, 4.

CONSOLIDATION of actions. See ACTION (D.). APPEALABLE ORDER, 2.

CONSPIRACY. See ASSAULT AND BATTERY, 1, 2. VAGRANCY, 2.

CONSTITUTIONAL LAW. See TAXATION, 1. TAX TITLES, 1. UNLAWFUL DETAINER, 5. VAGRANCY, 3.

CONSTRUCTIVE NOTICE. See RECORDING ACTS. VENDOR, ETC. OF LAND, 1.

CONTINGENT CLAIMS. See ESTATES OF DECEDENTS, 2.

CONTINUANCE. See APPEAL (C.), 2–4. MILWAUKEE MUNICIPAL COURT, 2.

CONTRACTS.

See AGENCY. ATTACHMENT, 2, 3, 5, 8. BAILMENT. BILLS AND NOTES. CHATTEL MORTGAGES. CORPORATIONS, 1, 2, 6. DAMAGES, 6. DURESS. ESTATES OF DECEDENTS, 3. GARNISHMENT. INSURANCE. LANDLORD AND TENANT. LIMITATION OF ACTIONS, 2, 3. MINES AND MINING. MUNICIPAL CORPORATIONS. PARENT AND CHILD. PARTIES, 2. PARTNERSHIP. PLEADING, 5. RAILROADS (C.), 9. SALE OF CHATTELS. TELEGRAPH COMPANIES. VENDOR, ETC. OF LAND. VOLUNTARY ASSIGNMENT.

1. An alteration of a written contract, which in no way changes the legal effect thereof as between the parties thereto, is immaterial and does not avoid the contract. *Fuller v. Green*, 159

2. Merely affixing the name of an attesting witness to a promissory note is not a material alteration thereof. *Ibid.*

3. If an alteration is immaterial, the intent with which it was made is immaterial. *Ibid.*

4. The materiality of an alteration is to be determined by its effect upon the rights of the parties under the laws of the state in which the question is raised. *Ibid.*

5. Defendants discounted notes belonging to the plaintiff under an agreement that they would protest the same or cause them to be protested if they could, but would not be responsible for protest: that the plaintiff would, in any case, be responsible for the payment of the notes, would bear the risk of collecting them, and

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would at all times keep collaterals in defendants' hands as security for such collection. *Held*, that such agreement was not within the statute of frauds. *Cribb v. Houghton*, 333

CONTRIBUTORY NEGLIGENCE. See HIGHWAYS AND BRIDGES, 9. NEGLIGENCE. RAILROADS (D.), 1-7.

CONVERSION.

See BAILMENT.

1. The evidence in this case is *held* to sustain a verdict to the effect that notes alleged to have been converted by defendants were held by them as collateral security for an indebtedness of the plaintiff. *Cribb v. Houghton*, 333

2. One joint owner of a vessel cannot maintain an action against his co-owner for a conversion thereof, except in case of a total destruction, or something equivalent thereto, through the fault of such co-owner. The fact that the co-owner has negligently damaged the vessel, or has run it into debt and created liens upon it beyond its value, is not sufficient. *Alderson v. Schulze*, 460

3. An action to recover the value of timber wrongfully cut upon the land of the plaintiff may be brought against the person who did the cutting and one who purchased the timber knowing that it had been so wrongfully cut, jointly. Sec. 4269, R. S. *Smith v. Briggs*, 497

4. A complaint charging separately a conversion of personal property by one defendant by his sale thereof to the other, and a conversion by the latter by his purchase from the former, states, in effect, a joint conversion and but one cause of action. *Ibid.*

5. In an action for the conversion of lumber, brought against an innocent purchaser of the logs from which the lumber was made and which were wrongfully cut by his vendor from the plaintiffs' land, evidence of the plaintiffs' title to the land and of such cutting is admissible although the complaint contains only a general averment of plaintiffs' ownership of the lumber alleged to have been converted. [But the defendant being liable in such an action only for the value of the logs at the time of the cutting, it would seem to be better pleading to set out the description of the land and by whom and when the logs were cut therefrom; and it might be proper, on motion, to direct a complaint to be made more definite and certain in those respects.] *Millard v. McDonald Lumber Co.* 626

6. From the fact that a person cutting timber did so by the orders and under the authority of a person not the owner of the land, it will not be presumed that the latter had any license from the owner authorizing such cutting. *Lewis v. Disher*, 32 Wis. 504, distinguished. *Ibid.*

CONVEYANCE. See ATTACHMENT, 5, 8. CORPORATIONS, 6. DAMAGES, 2-4. DEED. DOWER. ESTOPPEL, 2. EVIDENCE, 8. GARNISHMENT. LIMITATION OF ACTIONS, 2, 3. RECORDING ACTS. TAX TITLES. VENDOR, ETC. OF LAND.

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CORPORATIONS.

(A.) *Private Corporations.*
See BANKS AND BANKING. RAILROADS. TAXATION. TELEGRAPH COMPANIES.

1. Where a majority of the directors of a bank make an informal agreement to take the assets and assume the liabilities of a private banking business, and the corporation thereupon takes and retains such assets under the agreement, it will be held to have ratified the action of the directors and to be bound by all the terms of the agreement. *Bank of New London v. Ketchum,* 7

2. The evidence in this case is *held* to warrant a finding that the plaintiff bank, upon taking the assets and assuming the liabilities of the private banking business of one P., did not agree to pay certain notes executed by him, and that the plaintiff was therefore not liable to the defendant upon a counterclaim for moneys paid by the latter as indorser on said notes. *Ibid.*

3. Where the property of a corporation is being mismanaged, and is in danger of being lost to the stockholders and creditors through the collusion and fraud of its officers and directors, a receiver may be appointed. *Haywood v. Lincoln Lumber Co.* 639

4. The directors and officers of an insolvent corporation are trustees for the creditors and must manage its property and assets with strict regard to their interests; and if they are themselves creditors, while the insolvent corporation is under their management they cannot secure to themselves any preference or advantage over other creditors. *Ibid.*

5. The directors and officers of a corporation have no right to use their official position for their own benefit, to the injury of others in equal right. *Ibid.*

6. The directors or officers of a corporation cannot mortgage or convey the corporate property to themselves. *Ibid.*

(B.) *Municipal Corporations.*
See MUNICIPAL CORPORATIONS.

COSTS.

See BANKS AND BANKING, 5. ESTATES OF DECEDENTS, 8. UNLAWFUL DETAINER, 4.

In an action upon a recognizance taken in a criminal case, upon overruling a demurrer to the complaint, costs may be awarded against the defendants. *State v. Wettstein,* 234

COUNTERCLAIM. See DAMAGES, 6. DOWER.

COUNTIES. See VAGRANCY, 2.

COUNTY BOARD. See APPEAL (A.), 4.

COUNTY COURTS. See VAGRANCY, 1, 3.

COURT AND JURY.

See INSTRUCTIONS TO JURY. JUDGMENT (I.), 2. PRACTICE, 1–5. RAILROADS (D.), 2–4, 11, 12. VERDICT.

Though in a criminal action certain evidence was held sufficient to sustain a conviction for receiving stolen money, yet it does not

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necessarily follow that, upon substantially the same evidence in a civil action against the same defendant to recover the money, the court should direct a verdict for the plaintiff. *U. S. Exp. Co. v. Jenkins,* 542

COURTS.

See APPEAL. JUSTICES' COURTS. MILWAUKEE MUNICIPAL COURT. PUBLIC LANDS. VAGRANCY.

Where, by the general laws, a court has other powers than those mentioned in a particular section of the statutes, which grants affirmatively a more restricted power, the general power of the court in that respect is not necessarily taken away. *State v. Wettstein,* 234

COVENANT.
Of seizin. See DAMAGES, 2–4. VENDOR, ETC. OF LAND, 8.
For quiet possession. See VENDOR, ETC. OF LAND, 4.
Not to assign or underlet, etc. See LANDLORD AND TENANT.

CRIMINAL LAW AND PRACTICE.

See COSTS. VAGRANCY.

1. A warrant for arrest issued in March, 1878, and stating that the offense was committed on May 20, 1878, instead of on May 20, 1877, as charged in the complaint, is not invalid. The mistake could not mislead, and the warrant might be amended. *Heckman v. Swartz,* 48

2. A criminal complaint attempted to charge the offense of fornication, but failed to state that the woman was unmarried. The validity of the warrant issued thereon being called in question in an action to recover money alleged to have been paid under duress of imprisonment, *held,* that the omission of such statement did not invalidate the warrant or render the arrest illegal. *Ibid.*

3. An instrument in the form of a promissory note for the payment of "25.00 as per deed, 10 per cent. till paid," is a note for twenty-five *dollars;* and in an information for the forgery thereof no averment of extrinsic facts is necessary to show that such is its character. *State v. Schwartz,* 432

4. The evidence in this case is *held* to sustain a conviction of the crime of rape; and the instructions to the jury defining the crime and as to the consideration of the evidence by the jury, are *held* to have been correct. *Osgood v. State,* 472

5. In the absence of any showing to the contrary it will be presumed that jurors were regularly drawn and summoned. *Ibid.*

6. It is not necessary to read the information to the jury when the defendant has been properly arraigned, and has pleaded to the information, and the jury have been fully instructed as to the nature of the crime with which he is charged. *Ibid.*

CROSS-ACTIONS, Consolidation of. See ACTION (D.).

CUSTOM. See BANKS AND BANKING, 3. CHANGE OF VENUE, 3.

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DAMAGES.

See ESTATES OF DECEDENTS, 3. RAILROADS (B.), 3–5. TELEGRAPH COMPANIES. TRUSTS AND TRUSTEES, 2.

1. Where, by reason of the maintenance by defendant of an obstruction in a navigable stream, the plaintiffs were so delayed in their business of rafting logs in the season of high water that they were compelled to do a portion of such work at increased expense in the ensuing season of low water,—such seasons being of usual occurrence each year,—such increase in the expense of the work may be recovered as damages in an action for the obstruction. *Gates v. N. P. R. Co.* 64

2. In an action for breach of a covenant of seizin the measure of plaintiff's damages is the consideration paid for the land, and interest thereon from the date of payment, in lieu of mesne profits; the grantee being left to his remedy against the evictor who has established a paramount title, to obtain pay for improvements. *Conrad v. Trustees,* 258

3. In such a case a tender of the money paid by the grantee and of the unpaid notes and mortgage given by him to secure deferred payments, is a sufficient tender. *Ibid.*

4. After land had been conveyed by the defendant corporation to C., one W. obtained judgment establishing his title thereto as paramount. C. appealed from the judgment and gave an undertaking to pay W. the value of the use and occupation of the land pending the appeal, should the judgment be affirmed. Two of the defendant's officers, on its behalf, became sureties on such undertaking. The judgment was affirmed, and the defendant was obliged to pay W. $125 on such undertaking. *Held,* that such sum should be deducted from the amount of damages recoverable for the breach of the covenant of seizin in the deed to C. *Ibid.*

5. A verdict for $1,600 damages is *held* not excessive where plaintiff's arm was broken and the use of his hand probably permanently impaired. *Meracle v. Down,* 323

6. Allegations, in a counterclaim, that the failure of the plaintiff to deliver goods of the kind and quality ordered prevented defendants from entering into the business of selling them in the season therefor, to their damage, etc., are insufficient to lay a foundation for the recovery of damages without a further allegation that the plaintiff knew the special circumstances and the purpose for which the goods were ordered. *Buffalo B. W. Co. v. Phillips,* 338

7. Upon the question of damages for the negligent killing of a child, evidence that the parents are poor, in bad health, and obliged to work for a living is admissible; and in such a case the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of the life even beyond minority. *Johnson v. C. & N. W. R. Co.* 425

8. A verdict for $2,500 for the killing of a boy about seven years old, is *held* not so excessive as to warrant the interference of this court. *Ibid.*

9. The damages recoverable by a widow suing as administratrix for the death of her husband, will include the value of her support and ro-

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tection by her husband during the time he would probably have lived and supported her but for his death by the act or neglect of the defendant; and the jury may also consider the addition that the earnings of the deceased would probably have made to his wealth and property had he continued to live, and the reasonable expectation which the plaintiff had of pecuniary advantage by ultimately receiving a share of such earnings as one of his heirs, and damages may be given with respect to that expectation being disappointed, and to the probable pecuniary loss resulting therefrom. *Lawson v. C., St. P., M. & O. R. Co.* 447

DEBTOR AND CREDITOR. See APPEAL (C.), 1, 5. ATTACHMENT. BANKS AND BANKING. BILLS AND NOTES. CHATTEL MORTGAGES. CONTRACTS, 5. CONVERSION, 1. CORPORATIONS, 3–6. DURESS. ESTATES OF DECEDENTS, 1–3. ESTOPPEL, 1. EVIDENCE, 3. GARNISHMENT. PARENT AND CHILD. PARTIES, 2. PARTNERSHIP. PRACTICE, 7. REPLEVIN. SUPPLEMENTARY PROCEEDINGS. TENDER. VOLUNTARY ASSIGNMENT.

DECEIT.

Representations, to be fraudulent, must relate to a present or past state of facts, and relief as for deceit cannot be obtained for non-performance of a promise looking to the future. *Patterson v. Wright,* 289

DEED.

See CORPORATIONS, 6. DAMAGES, 2–4. DOWER. ESTOPPEL, 2. RECORDING ACTS. TAX TITLES. VENDOR, ETC. OF LAND.

A finding of the jury that the son, who was of the same name as his father, was the grantee named in a deed, is held to be sustained by the evidence. *Begg v. Anderson,* 207

DEFINITIONS. See WORDS AND PHRASES.

DELIVERY. See SALE OF CHATTELS, 3, 5.

DEMAND. See HUSBAND AND WIFE.

DEMURRER. See APPEAL (C.), 6. COSTS. MILWAUKEE MUNICIPAL COURT, 2. MORTGAGES, 3. PLEADING, 5. PRACTICE, 1.

DESCRIPTION.
Of chattels, in mortgage. See CHATTEL MORTGAGES, 2.
Of land in deed — Uncertainty. See TAX TITLES. VENDOR, ETC. OF LAND, 2.
Of land from which timber was cut, in complaint for conversion. See CONVERSION, 5.

DIRECTORS of corporation. See CORPORATIONS, 1, 3–6.

DISCRETION. See APPEAL (A.), 4. BANKS AND BANKING, 5. CHANGE OF VENUE, 2. DIVORCE, 4. SUPPLEMENTARY PROCEEDINGS. VAGRANCY, 1.

DIVISION of property of town, etc. See TOWNS, 1.

DIVORCE.

1. The trial court has power, after a judgment of divorce has been granted, to allow alimony and to provide for the support of chil-

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dren, although no provision for either was made in such judgment. *Crugom v. Crugom,* 253

2. But upon application for alimony in such a case it is not proper to inquire into the paternity of a child born before the marriage, in order to charge the husband with its support. *Ibid.*

3. A judgment of divorce and for a division of the husband's estate, so far as it vests title to his real estate in the wife, is final and cannot be modified by the trial court after the term at which it is rendered. *Webster v. Webster,* 438

4. In a case where the husband's estate was of small value, the wife was in feeble health, and the husband was able to earn his own support, it is *held* that it was not inequitable, in granting a divorce to the wife, to set apart to her the homestead, although it was of greater value than the remainder of the estate. *Ibid.*

DOGS.

See EVIDENCE, 2. NEGLIGENCE, 1.

In an action for an injury caused by a dog, notice to or knowledge by the owner of its vicious character need not be shown. Sec. 1620 R. S. *Meracle v. Down,* 323

DOWER.

Plaintiff conveyed certain land to his son, by way of advancement, subject to a mortgage of $1,500, which the son assumed, and it was verbally agreed that the plaintiff should have the possession and use of the premises during his life. Subsequently he conveyed a small additional strip of land to the son, and a settlement was had in pursuance of which the son gave the plaintiff his note for $2,500, secured by mortgage upon the whole premises. Afterwards the son, on his wedding day but before the marriage was consummated and without the knowledge of his intended wife, reconveyed the premises to this plaintiff. This last deed was lost before it was recorded. The plaintiff paid the $1,500 mortgage. After the son's death the plaintiff brought this action to establish his title to the premises and to bar the claim of the widow to dower. The widow counterclaimed to set aside the last deed to the plaintiff, and for the recovery of dower. Upon the evidence it is *held:*

(1) The last deed to the plaintiff was in fraud of the defendant's right to dower, and she is entitled to dower notwithstanding, and to one third of the rents and profits from the time of filing her answer.

(2) Such deed being void as to the dower right did not merge the $2,500 mortgage which was valid as against such right.

(3) But the dower right is not subject to the $1,500 mortgage. Plaintiff's payment of that mortgage was in pursuance of the settlement, and he did not become subrogated to the rights of the mortgagee. *Jones v. Jones,* 301

DURESS.

See CRIMINAL LAW, 2.

1. Although an arrest may be for a just cause and under valid process, yet if it be for an illegal purpose, and the person arrested pays

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money for his release, he may recover it back as having been paid under duress of imprisonment. *Heckman v. Swartz,* 48

2. But if such money was paid by the plaintiff voluntarily and after the duress and the influence thereof had ceased, it cannot be recovered. *Ibid.*

3. Under duress of imprisonment on a charge of fornication with defendant's daughter, made by the defendant for the purpose of forcing a settlement, the plaintiff agreed to pay money to the defendant. In pursuance of such agreement he executed his notes and a mortgage to M., and M. executed his notes to the defendant, the latter on his part executing a release to the plaintiff. The mortgage was to be signed by plaintiff's wife and the release by defendant's daughter; and the instruments were deposited with C. to be delivered by him to the persons respectively entitled thereto after such signatures should be obtained. They were afterwards so delivered, the defendant accepting the notes of M. as payment of the sum agreed to be paid by the plaintiff. After delivery of the instruments to C., but before delivery by him to the respective parties, the plaintiff was released. *Held,* that the plaintiff, having fully performed the agreement on his part before the duress had ceased, might recover from the defendant the amount paid on the settlement. *Ibid.*

EJECTMENT.

See LIMITATION OF ACTIONS. VENDOR, ETC. OF LAND, 5.

In ejectment the want of title in the plaintiff is purely a legal defense and is well pleaded by a general denial. *Fowler v. Scott,* 509

EMINENT DOMAIN. See RAILROADS (B.).

ENCROACHMENTS. See HIGHWAYS, 3.

EQUITY.

See ACTION (E.). ATTACHMENT, 1. ATTORNEY AT LAW. BANKS AND BANKING. CHATTEL MORTGAGES. CORPORATIONS, 3–6. DIVORCE, 4. DOWER. ESTOPPEL. MORTGAGES. MUNICIPAL CORPORATIONS, 3, 4. PARENT AND CHILD. PLEADING, 2. PRACTICE, 1–5. PUBLIC LANDS. TAXATION, 5–7. TRUSTS AND TRUSTEES.

An action to quiet title, under sec. 3186, R. S., was brought by the owner of land against one who had purchased the same at an execution sale under a void judgment. Just before the action was commenced the defendant had assigned the certificate of such sale to his father, for a nominal consideration, in order to avoid the consequences of the action, but the certificate still remained entirely under his control, and such assignment was kept secret from the plaintiff. In his answer the defendant did not disclaim all title to the land and certificate and offer to give a release. *Held,* that judgment was properly rendered against him. *Manning v. Heady,* 630

EQUIVOCATION in deed. See DEED.

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ESTATES OF DECEDENTS.

See PARENT AND CHILD. WILLS.

1. In 1875 P. devised certain lands to an infant child, upon whose death in 1876 the lands descended to his parents. In May, 1883, on petition of the mother, partition of the estate of P. was made by the county court, and the lands devised to the infant child were divided between the parents as his sole heirs. In July, 1883, administration of the child's estate was granted to the mother, and she thereupon presented a claim against such estate for the support and maintenance of the child. *Held*, that the partition of the land was subordinate and subject to the payment of claims against the estate of the child, and did not estop the mother from asserting such claim. *Pierce v. Pierce*, 73

2. A contingent claim against the estate of a decedent, which does not accrue and cannot be proven until after the administration is closed and the estate distributed, is not barred because not presented to the probate court for allowance. When such a claim becomes absolute the holder thereof may maintain an action against the heirs, devisees, etc., under ch. 141, R. S. *Mann v. Everts*, 372

3. The sureties on a bond given by an administrator on obtaining license to sell real estate, are liable for the amount of the proceeds of the sale unaccounted for by the administrator and for the costs necessarily resulting from the proceedings to compel him to account therefor, but not for the amount paid for counsel fees in such proceedings. *Ibid.*

4. In an action by an administrator to recover damages for the death of his intestate the complaint alleged that the deceased left no property. The answer denied the appointment of the plaintiff as administrator. *Held*, that the letters of administration issued to the plaintiff were admissible in evidence, notwithstanding an objection on the ground that, there being no estate to administer, there was no authority to issue the letters. *Phillips v. C. M. & St. P. R. Co.* 475

ESTOPPEL.

See CHATTEL MORTGAGES, 6. ESTATES OF DECEDENTS, 1. HIGHWAYS, 4. INSURANCE, 2.

1. A father stocked a farm and placed his son thereon to carry it on and make his living therefrom. The son contracted a debt for which the stock was attached. In an action of replevin brought by the father it appeared that he knew nothing of the debt at the time it was contracted, and it did not appear that he knew that the son was holding himself out as the owner of the property for the purpose of obtaining credit, nor that the debt in question was contracted on the faith that the son was the owner. *Held*, that the father was entitled to recover. *Morgan v. Pierron*, 523

2. Where, on the trial, defendant admitted that a deed and bond offered in evidence did not constitute a mortgage, and, acting on such admission, plaintiff failed to put in certain testimony, and the court directed a verdict for the plaintiff, the defendant cannot, on appeal, claim that the transaction was in fact a mortgage. *Evans v. Enloe*. 671

EVICTION. See DAMAGES, 2–4. VENDOR, ETC. OF LAND, 3, 4.

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EVIDENCE.

See APPEAL (A.), 1, 8, 9. ASSAULT AND BATTERY, 1, 3. BANKS AND BANKING, 2, 3. BASTARDY. BILLS AND NOTES, 1. BOUNDARIES. BROTHERTOWN INDIANS, 2–6. CONVERSION, 1, 5. COURT AND JURY. CRIMINAL LAW, 4. DAMAGES, 7, 9. DEED. ESTATES OF DECEDENTS, 4. HIGHWAYS, 5, 6. HUSBAND AND WIFE. INSTRUCTIONS TO JURY. INSURANCE, 2, 4. JUDGMENT (B.); (I.), 1. MISTAKE. PLEADING, 1, 3. RAILROADS (B.), 3–5; (D.), 2–4, 7, 10. SERVICE BY PUBLICATION, 3. STATUTES. TAX TITLES. VENDOR, ETC. OF LAND, 2, 4. VERDICT. WILLS, 1.

1. The plaintiff having been bitten in the thumb by one of the defendants, a medical expert who had examined the wound might properly be asked to state the tendency or danger "of that kind of a wound." *Rhinehart v. Whitehead*, 42

2. In an action for injuries alleged to have been caused by defendant's dog attacking plaintiff's horses, it appeared that a neighbor living a mile distant also had a dog which the plaintiff admitted was very much like that of the defendant in form, shape, and general appearance, but it did not appear that the neighbor's dog was ever at the defendant's place where the attack was made. *Held*, that it was not error to exclude evidence that the neighbor's dog, like that of the defendant, was accustomed to attack horses. *Meracle v. Down*, 323

[3. Whether after the decease of the payee the maker of a note should be allowed to testify that it was given as part of the consideration for land conveyed to him by the payee, not determined.] *Bardeen v. Markstrum*, 613

EXAMINATION of judgment debtor. See SUPPLEMENTARY PROCEEDINGS.

EXCEPTIONS. See APPEAL (A.), 1, 3–7, 9.

EXCESSIVE DAMAGES. See DAMAGES, 5, 8.

EXECUTION. See UNLAWFUL DETAINER, 4.

EXECUTORS AND ADMINISTRATORS. See DAMAGES, 9. ESTATES OF DECEDENTS. PARENT AND CHILD. WILLS.

EXPERT TESTIMONY. See EVIDENCE, 1. RAILROADS (D.), 7.

FALSE IMPRISONMENT.

In an action for false imprisonment the defendant cannot justify his participation in the arrest and detention under a warrant issued by a magistrate unless such warrant was valid on its face. *Gelzenleuchter v. Niemeyer*, 316

FALSE REPRESENTATIONS. See DECEIT.

FEES.
Of clerk of court. See CHANGE OF VENUE, 3.
Of village marshal and justices. See VAGRANCY, 2.
License fees. See TAXATION, 1–4.

FELLOW-SERVANTS. See RAILROADS (D.), 14.

FILING papers. See CHANGE OF VENUE, 3.

FINDINGS OF FACT. See APPEAL (A.), 1, 8.

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FORECLOSURE.
Of mortgages. See MORTGAGES. UNLAWFUL DETAINER, 2.
Of lien of certificates of board of public works. See MUNICIPAL CORPORATIONS, 4.

FORFEITURE of land grant. See TAXATION, 5.

FORGERY. See CRIMINAL LAW, 3.

FORNICATION. See CRIMINAL LAW, 2.

FRAUD. See ATTORNEY AT LAW, 3. BILLS AND NOTES, 1–3. CORPORATIONS, 3–5. DECEIT. EQUITY. INSURANCE, 4. PUBLIC LANDS. SALE OF CHATTELS, 1, 2.

FRAUDS, STATUTE OF. See CHATTEL MORTGAGES, 4, 5. CONTRACTS, 5. SALE OF CHATTELS, 5, 6.

FRAUDULENT CONVEYANCE. See ATTACHMENT, 5, 8. EQUITY.

FRAUDULENT REPRESENTATIONS. See DECEIT.

FUTURE ADVANCES. See ATTACHMENT, 8.

GARNISHMENT.

See CHATTEL MORTGAGES, 1.

W. occupied certain land, claiming an interest therein, but the legal title was in B., who sold and conveyed the land to R. for $5,000; $2,000 in cash, and balance on time. B., to settle the claim of W., and to obtain surrender of possession, directed R. to pay her a sum not exceeding $1,000, the payment to her to be credited on the deferred payments. R. paid her $300, but no more was paid to her by R. or B., and there was no proof that either of them agreed to pay her any more, or that she agreed to surrender possession of the land, and she in fact retained such possession. *Held*, that B. was not liable as a garnishee of W. *Goode v. Barr*, 659

GUARANTY. See CONTRACTS, 5.

HIGHWAYS AND BRIDGES.

See NAVIGABLE RIVERS. RAILROADS (D.), 1–4.

1. The order for laying out a highway under sec. 1275, R. S., need not state that it connects with another highway. *Moore v. Roberts*, 538

2. If it be proved that a highway laid out under sec. 1275, R. S., connects with a commonly used and traveled highway, it need not be further shown in order to sustain the validity of the former, that the latter is a *legal* highway. *Ibid.*

3. Although only a portion of a highway has been continuously used, the other part does not for that reason cease to be a highway. *Ibid.*

4. Acceptance of the damages assessed for the laying out of a highway over his land will estop the owner and those claiming under him from denying the legal existence of such highway. *Ibid.*

5. When a written notice under sec. 1339, R. S., was offered in evidence, the date January 11, 1884, appeared to have been erased and the

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date December 11, 1883, substituted. The plaintiff testified that he thought the alteration was made before the notice was served, and the evidence tended to show that such service was made December 11, 1883. *Held*, that the notice and the explanatory evidence were properly admitted. The time of service, not the date of the notice, was the material thing. *Spearbracker v. Larrabee*, 573

6. Evidence that a bridge was out of repair, and the planks old and decayed at other points than the one where an accident occurred, is admissible to show such a general defective condition of the bridge as would charge the town authorities with notice of its condition. *Ibid.*

7. The town is liable for the damage happening by reason of the insufficiency or want of repair of a bridge in a village within its limits, unless such bridge is regulated by the provisions of a special village charter or is situated upon a street laid out in such village and not upon a town, county, or state road. *Ibid.*

8. The fact that a village has occasionally made slight repairs upon a bridge which the town is bound to maintain, will not affect the liability of the town for an injury resulting from the defects or lack of repair thereof. *Ibid.*

9. From the fact that the plaintiff knew of a defect in a bridge before driving thereon, it does not necessarily follow that he was negligent. *Ibid.*

HIRING of horses. See BAILMENT.

HOMESTEADS. See PUBLIC LANDS.

HUSBAND AND WIFE.

See DAMAGES, 9. DIVORCE. DOWER. PARENT AND CHILD. TENDER. VENDOR, ETC. OF LAND, 3.

A wife who, by her husband's direction, makes a demand for a deed and an offer of payment, is for that purpose his agent, and may testify in his behalf to such demand and offer. *Meade v. Gilfoyle*, 18

IDENTITY of grantee in deed. See DEED.

IMPRISONMENT. See DURESS. FALSE IMPRISONMENT. UNLAWFUL DETAINER, 5.

INDEBTEDNESS in pleading. See CONVERSION, 5.

INDIAN RESERVATION. See BROTHERTOWN INDIANS.

INFANTS. See PARENT AND CHILD.

INFORMATION. See CRIMINAL LAW, 3, 6.

INSOLVENT CORPORATIONS. See BANKS AND BANKING. CORPORATIONS, 4.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 4. NEGLIGENCE, 2. RAILROADS (D.), 6, 11, 12 (1).

In an action for money had and received the evidence for the plaintiff was wholly circumstantial. The instructions to the jury sep-

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arated the collateral facts shown and stated as to each that it was not sufficient of itself to warrant a verdict for the plaintiff, and also stated that, in order to recover, the plaintiff must show that the defendant actually took the money, or actually obtained and improperly kept that same identical money. The jury was not instructed as to the nature and effect of circumstantial evidence. *Held*, that the instructions given were misleading. *U. S. Exp. Co. v. Jenkins*, 542

INSURANCE AGAINST FIRE.

See CHATTEL MORTGAGES, 1.

1. A seal-skin dolman which was insured as wearing apparel by a policy describing it as "contained in" a certain dwelling-house, was burned while in the store of a furrier to which it had been sent for repairs. *Held*, that the insurer was liable, although the risk of loss was greater in such store than in the dwelling-house designated. *Noyes v. N. W. Nat. Ins. Co.* 415

2. In an action upon a policy of insurance evidence that the plaintiff presented a list of the articles destroyed, with the value of each, to the agent of the company, who examined and returned it without objection to its form or authentication, and that such agent afterwards required the plaintiff to submit privately to a full examination under oath as to the particulars of the loss, and reduced the same to writing, and expressed himself satisfied therewith, and carried the same away and kept it until the trial, is *held* admissible although such facts were not pleaded as a waiver or estoppel. *Zielke v. London Ass. Co.* 442

3. Such facts would amount to a waiver of any further proofs of loss and of all defects therein. *Ibid.*

4. Evidence to show that in reducing the examination of the plaintiff to writing the agent of the company had, by mistake or fraud, represented her as saying that she was not the owner of the property insured, and to correct such statement, is admissible although the mistake or fraud was not pleaded. *Ibid.*

5. Statements made by the agent of the company to plaintiff's husband (who was her agent to *settle* the loss for her), to the effect that the company was not liable and would not pay anything, are *held* admissible to show a waiver of formal proofs of loss. *Ibid.*

6. A dwelling-house, granary, and horse-barn were insured by a policy which stated that they were occupied by a tenant, and provided that if they became vacant or unoccupied and remained so without consent, etc., the policy should be void. The tenant left and the premises were for some time vacant. Afterwards the assured told the agent of the company that he was not going to leave a tenant in the house any more, and explained that he couldn't work the farm and keep the tenant there; that he wanted his men to go there and do the farm work; that his men had to go from place to place, and that while they were there they would live in the house. Thereupon the agent indorsed upon the policy: "It is understood that the buildings insured hereunder are now occupied for dwelling and farm purposes." The assured lived upon another farm about two miles distant, but carried on the farm upon which the insured buildings were situated. While his men were at work

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upon the latter farm they cooked, ate, and slept in the dwelling-house, in which there was some furniture; but when no work was being done on that farm no one stayed in the house, though frequently some one would go through the house to see if things were right. *Held*, that the dwelling-house was not "occupied" within the meaning of the indorsement upon the policy. [TAYLOR and ORTON, JJ., dissent, being of the opinion that the indorsement, construed in the light of the explanation made to the agent, did not contemplate a continuous occupancy.] *Fitzgerald v. Conn. F. Ins. Co.* 468

INTENT. See CONTRACTS, 3.

INTEREST. See BANKS AND BANKING, 5. DAMAGES, 2. MORTGAGES. TRUSTS AND TRUSTEES, 2.

INTER-STATE COMMERCE. See TAXATION, 1.

INVESTMENT of trust funds. See TRUSTS AND TRUSTEES, 2-4.

JOINDER.
Of causes of action. See CONVERSION, 4.
Of parties. See CONVERSION, 3.
In notice of appeal from award of commissioners of appraisal. See RAILROADS (B.), 1, 2.

JOINT TENANCY. See CONVERSION, 2.

JUDGMENT.

(A.) *What is a judgment.*
See APPEAL (C.), 5.

(B.) *Judgment non obstante veredicto.*

Where the evidence conclusively shows that the plaintiff is not entitled to recover, and a special verdict contains no finding which interferes with the rendition of judgment for the defendant, judgment may be rendered accordingly although the verdict does not find the facts essential to support such judgment. *Munkwitz v. Uhlig,* 380

(C.) *To remove cloud upon title, when rendered.*
See EQUITY.

(D.) *Judgment correcting deed operates as conveyance.*
See RECORDING ACTS, 1, 2.

(E.) *Former judgment, when a bar.*
See MINES AND MINING, 5. TRUSTS AND TRUSTEES, 8.

(F.) *Lien of attorney on judgment.*
See ATTORNEY AT LAW, 1, 2.

(G.) *Modification of judgment.*
See DIVORCE, 3.

(H.) *When judgment is perfected.*

See APPEAL (A.), 2.

(I.) *Reversal of judgment.*
See APPEAL (A.), 6, 7; (C.), 1, 5. BASTARDY, 2. BROTHERTOWN INDIANS, 4. DAMAGES, 5, 8. INSTRUCTIONS TO JURY. JUSTICES' COURTS. VERDICT.

1. An error in admitting testimony is immaterial if the other evidence upon the point is conclusive. *Meracle v. Down,* 823

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2. An error in submitting a question to the jury for a special finding is immaterial if the findings upon the questions properly submitted sustain the judgment. *Johnson v. C. & N. W. R. Co.* 425

JURISDICTION. See COURTS. MILWAUKEE MUNICIPAL COURT. PUBLIC LANDS. SERVICE BY PUBLICATION. UNLAWFUL DETAINER, 2. VAGRANCY, 1.

JURORS. See CRIMINAL LAW, 5. VAGRANCY, 3.

JURY TRIAL. See PRACTICE, 1–5.

JUSTICES' COURTS.

See APPEAL (C.). APPEALABLE ORDER, 1. UNLAWFUL DETAINER, 1, 2. VAGRANCY, 1, 2.

On *certiorari* to a justice of the peace, the circuit court can only reverse or affirm his judgment, with costs. Even on reversing a judgment in an action of unlawful detainer under which the plaintiff has been put into possession of the premises, it cannot award a writ of restitution. *Newton v. Leary,* 190

JUSTICES OF THE PEACE, Fees of, etc. See VAGRANCY, 2.

JUSTIFICATION. See ASSAULT AND BATTERY, 3. FALSE IMPRISONMENT.

LACHES. See APPEAL (C.), 2.

LAND CONTRACT. See LIMITATION OF ACTIONS, 2, 3. VENDOR, ETC. OF LAND, 1.

LAND GRANTS to railroads. See TAXATION, 5–7.

LANDLORD AND TENANT.

See MINES AND MINING. UNLAWFUL DETAINER.

The stock of goods belonging to the lessee of a store building was sold on execution and was purchased by Y., his father-in-law, who transferred it to his son, Y. Jr., in pursuance of an arrangement with the lessee that the business should be carried on in the name of Y. Jr., the lessee receiving a certain sum each month out of the profits for his maintenance, and the balance of the proceeds being applied in payment of his debts. Neither Y. nor Y. Jr. received any of the profits or proceeds of the business for their own use. The goods were not removed from the store and the business was conducted as before the sale, by the lessee, except that moneys received were deposited in the name of Y. Jr. and he signed all checks. *Held,* that these facts do not show a breach of a covenant in the lease not to assign or otherwise part with the lease and not to underlet or part with any portion of the leased premises. *Munkwitz v. Uhlig,* 380

LANDS SOLD FOR TAXES. See TAX TITLES.

LEASE. See LANDLORD AND TENANT. MINES AND MINING, 1, 2. TAXATION, 4 (5).

LEGITIMACY. See DIVORCE, 2.

LIBEL. See SLANDER AND LIBEL, 4.

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LICENSE to enter upon land. See CONVERSION, 6. MINES AND MINING, 2–4.

LICENSE FEES. See TAXATION, 1–4.

LIENS. See ATTORNEY AT LAW, 1, 2. MUNICIPAL CORPORATIONS, 4. VENDOR, ETC. OF LAND, 5.

LIMITATION OF ACTIONS.

See ESTATES OF DECEDENTS, 2.

1. If the facts showing that the time limited for bringing the action has expired are stated in the answer, the statute of limitations is available as a defense, although it is not stated that any particular statute is relied upon. *Meade v. Gilfoyle*, 18

2. To establish adverse possession of land under claim of title founded upon a written instrument, the vendee in possession under a parol contract for the sale of the land may avail himself of the former possession and title deeds of his vendor. *Ibid.*

[3. Whether a mere receipt for the purchase price of land is such a written instrument as would form the basis of a claim of adverse possession under sec. 4211, R. S., is not determined.] *Ibid.*

LOGS AND TIMBER. See CONVERSION, 3–6. DAMAGES, 1.

MANDAMUS.

1. An alternative writ issued upon petition should be the first proceeding in *mandamus* in the circuit courts. *State ex rel. Taylor v. Board of Supervisors of Delafield*, 218

2. Where a rule to show cause why a peremptory writ should not issue was the first proceeding, and on the hearing thereof the facts were disputed, it was error to determine such facts upon affidavits. An alternative writ should then have been issued. *Ibid.*

3. The peremptory writ is not a mere order of the court, but is a *writ*, and must be issued under the seal of the court, tested in the name of the judge, and returnable at some certain day. *Ibid.*

4. An appeal cannot be taken from the writ of *mandamus*, but only from the order or judgment allowing it. *Ibid.*

MARRIED WOMAN. See DAMAGES, 9. DIVORCE. DOWER. HUSBAND AND WIFE. PARENT AND CHILD. TENDER. VENDOR, ETC. OF LAND.

MASTER AND SERVANT. See RAILROADS (D.), 12–14.

MAXIMS.
Ambiguitas verborum latens verificatione suppletur, 355.
Id certum est quod certum reddi potest, 34.
Nil facit error nominis cum de persona constat, 355.

MEASURE OF DAMAGES. See DAMAGES.

MERGER. See DOWER, 2.

MILWAUKEE CITY CHARTER. See MUNICIPAL CORPORATIONS, 3, 4, 7, 8.

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MILWAUKEE MUNICIPAL COURT.

1. Sec. 2511, R. S., as amended by sec. 4, ch. 256, Laws of 1879, giving to the Milwaukee municipal court power to "bail over to an existing term, or to its next regular term," etc., does not take from that court its power under the general laws to take a recognizance for the attendance of a person from term to term. *State v. Wettstein*, 234

2. A recognizance was given for the appearance of a person at the January term of court and from term to term thereafter, until discharged by law. In an action thereon the complaint stated that at the next (February) term the principal defendant appeared and obtained a continuance of the cause to the March term; that at the March term he failed to appear, etc. *Held* that the failure to allege that the cause was continued from the January term to the February term did not render the complaint insufficient. *Ibid.*

MINES AND MINING.

1. A voluntary association, of which the defendant was a member, having a mining lease of a certain tract of land, obtained a similar lease of the adjoining lot (now owned by the plaintiffs) in order to extend into the same a level which they were running upon the former tract. The defendant subsequently became the owner of the former tract and the association surrendered to him its rights therein, but the lease of the plaintiffs' lot was not assigned to him. *Held*, that the defendant acquired no right under said lease to extend the level upon the plaintiffs' lot and to dig and remove ore therefrom. *Tipping v. Robbins*, 546

2. After the defendant became the owner of the first-mentioned tract one of the plaintiffs gave him an oral license to mine upon their lot. Afterwards a notice was posted upon said lot, notifying the association above mentioned, and all persons claiming under it, not to mine upon said lot under the lease to the association, because the same had been forfeited. After the posting of such notice the defendant continued for a long time, with the knowledge of the plaintiff who gave him the license, to run the level on his own lands towards the plaintiffs' lot, until finally he struck on the latter a valuable discovery. *Held*, that the notice posted was not a revocation of the license given to the defendant. *Ibid.*

3. A license to mine upon lands given by one tenant in common will not bind the other tenants. [Whether such license is of any value without a further license from the other tenants in common, not considered.] *Ibid.*

4. A license to mine upon lands is irrevocable under sec. 1647, R. S., after a valuable discovery or prospect has been struck by the licensee, even though he has not made an actual entry under the license. *Ibid.*

5. After the commencement of an action to recover damages for the breaking and entering upon plaintiffs' land and the removal of lead ore therefrom by defendant who claimed to have acted under a license, the latter commenced an action against two of the plaintiffs and two other parties, in the nature of an action *quare clausum*, to determine the rights of the defendants therein to sink a shaft from the surface of said land to the opening below whence he was

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removing the ore through a drift on his own adjoining lands. The trial of the latter action was first had, and resulted in a nonsuit. *Held*, that the judgment in that action did not conclude either party as to the issues in the action first mentioned. *Ibid.*

MISNOMER. See MISTAKE.

MISTAKE.

See APPEAL (A.), 8. CRIMINAL LAW, 1. INSURANCE, 4. SALE OF CHATTELS, 1.

A mistake in the Christian name of a grantee or person to whom any instrument is made, may be proved by parol and corrected in any action legal or equitable. *Cleveland v. Burnham*, 347

MORTGAGES.

See ATTACHMENT, 8. CHATTEL MORTGAGES. CORPORATIONS, 6. DOWER. ESTOPPEL, 2. UNLAWFUL DETAINER, 2.

1. A mortgage may be foreclosed for the breach of a condition thereof by failure to pay interest on the debt secured, although the mortgage itself does not provide for such foreclosure. *Scheibe v. Kennedy*, 564

2. Where a mortgage is conditioned for the payment of a certain sum, with interest, "according to the tenor of" the note to secure which the mortgage was given, the terms of such note are imported into the mortgage, and a failure to pay interest as provided in the note is a breach of the condition. *Ibid.*

3. In an action to foreclose a mortgage the complaint, if sufficient to maintain the action, is not demurrable because the relief demanded is greater than or different from that to which, upon the facts stated, the plaintiff is entitled. *Basse v. Gallegger*, 7 Wis. 442, distinguished. *Ibid.*

MUNICIPAL CORPORATIONS.

See HIGHWAYS AND BRIDGES, 5–9. TOWNS.

1. A municipal corporation is not responsible for an injury caused by a defect in a private structure (in this case an insufficiently guarded stairway leading to a basement) made by a lot-owner on his own land entirely outside of the traveled portion of the sidewalk and not connected therewith in such a way as to endanger the safety of those traveling thereon, even though such structure happens to be within the line of the street as originally surveyed. *Fitzgerald v. Berlin*, 203

2. Under the charter of the city of Racine (Laws of 1876, ch. 313, tit. III, sec. 5) a contractor to do work for the city cannot recover for extra work which he is directed by the city engineer to do, unless a contract therefor is countersigned by the city comptroller. *Lee v. Racine*, 231

3. Where a lot is sold by the city treasurer of Milwaukee for the amount of certificates of the board of public works, and is bid in by the city, the certificate of such sale issued to the city will be held by it in trust for the several owners of the certificates of the board of public works. *Hoyt v. Fass*, 273

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4. Two certificates of the board of public works against a lot in Milwaukee were owned by the plaintiff and a third by the defendants, all issued in one year. The lot had been sold for the amounts due on such certificates and the certificate of the sale was held by the city. The value of the lot was less than the amount due either on the plaintiff's certificates or on that of the defendants. The defendants had acquired the legal title to the lot, and declined to make any settlement with the plaintiff or to join with him in surrendering their several certificates to the city treasurer, taking up the sale certificate, and enforcing collection thereof, as provided in the city charter. *Held*, that the plaintiff, having by himself no remedy under the charter, might maintain an equitable action to have the amounts due on the several certificates of the board of public works determined and to enforce payment thereof by a sale of the lot and a *pro rata* division of the proceeds. *Ibid.*

5. A lot-owner, being the owner of the fee to the middle of the street, may construct vaults or other areas under the sidewalk with openings in the walk, if this is done in such a manner as not to interfere with or endanger public travel. *Papworth v. Milwaukee*, 389

6. But such owner is liable in damages to any person traveling the sidewalk who may be injured by reason of his neglect to keep such openings properly and securely covered or otherwise protected. *Ibid.*

7. Sec. 1, ch. 20 of the charter of Milwaukee (Laws of 1874, ch. 184) — providing that when any injury shall happen by reason of any defect in any sidewalk or other cause for which the city would be liable, and such defect or other cause of injury shall arise from the default or negligence of any person, such person shall be primarily liable for such injury, and the city shall not be liable therefor until after all legal remedies against such person have been exhausted, — applies only when the default or negligence of the person was the *sole cause* of the injury. *Ibid.*

8. Under the charter, therefore, when the actual neglect of the city (in this case the failure to keep the sidewalk itself in repair) concurs in causing the injury with the neglect of the owner to keep the opening properly protected, the action may be brought in the first instance against one or both of the wrong-doers, and in an action against either the wrongful act or negligence of the other is no defense. *Ibid.*

NAVIGABLE RIVERS.

See DAMAGES, 1.

When a railroad bridge with its draw closed is an unlawful obstruction of a navigable river, parties using the river are not bound to notify the railroad company to open the draw every time they wish to pass through; nor are they bound to open the draw themselves; nor are they bound to use only such vessels as can pass under the bridge when the draw is closed. *Gates v. N. P. R. Co.* 64

NEGLIGENCE.

See BAILMENT. HIGHWAYS, 9. MUNICIPAL CORPORATIONS, 1, 5–8. RAILROADS (D.). TELEGRAPH COMPANIES.

1. Evidence showing that while plaintiff was driving along the highway in the dusk of evening his horses were suddenly attacked by a dog

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and jumped and kicked, and that plaintiff raised himself by the reins to his feet and while in that posture was thrown from the wagon and injured, is *held* not to show contributory negligence on his part. *Meracle v. Down*, 323

2. A charge to the jury stating that one of the issues was whether the plaintiff was injured while he was "free from any fault causing or contributing directly to the injury," and that "if the injuries to plaintiff were caused by his intoxication, or by the loose manner in which the seat was placed upon the buggy in which he was riding, and not by the defendant's dog, the plaintiff would not be entitled to recover,"— is *held* to state sufficiently the law of contributory negligence applicable to those facts. *Ibid.*

3. But *quære* whether negligence can be predicated upon the fact that the seat in a vehicle is not securely fastened thereto. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. CONTRACTS. CONVERSION, 1. CORPORATIONS, 2. CRIMINAL LAW, 3. DURESS, 3. EVIDENCE, 3. MORTGAGES, 2.

NEW TRIAL. See PRACTICE, 3, 4. PUBLIC LANDS, 3.

NONSUIT. See MINES AND MINING, 5. RAILROADS (D.), 3.

NOTICE.
Of instructions to agent. See AGENCY.
Of trial. See APPEAL (C.), 4.
Of lien of attorney on judgment. See ATTORNEY AT LAW, 9.
Of fraud in obtaining note. See BILLS AND NOTES, 1–3.
Of setoff against payee of note. See BILLS AND NOTES, 4.
Of motion to extend time for transmission of record. See CHANGE OF VENUE, 4.
Of protest of notes for nonpayment. See CONTRACTS, 5.
Of purpose for which goods were purchased. See DAMAGES, 6.
Of vicious propensity of dog. See DOGS.
Of injury on highway, etc. See HIGHWAYS AND BRIDGES, 5.
Of defective condition of bridge. See HIGHWAYS AND BRIDGES, 6, 9.
Of revocation of license to mine on land. See MINES AND MINING, 2.
To railroad company to open draw-bridge. See NAVIGABLE RIVERS.
Of papers on which motion is based. See PRACTICE, 8.
Of appeal from award of commissioners. See RAILROADS (B.), 1, 2.
Constructive notice by recorded deeds. See RECORDING ACTS.
Of unrecorded deed. See RECORDING ACTS, 4.
Of importance of telegram. See TELEGRAPH COMPANIES, 2.
To tenant to quit. See UNLAWFUL DETAINER, 3.
Of rights of vendee of land in possession. See VENDOR, ETC. OF LAND, 1.

NUISANCE. See MUNICIPAL CORPORATIONS, 1, 5. NAVIGABLE RIVERS.

OFFICERS.
Clerk of court. See CHANGE OF VENUE, 3.
Justices of the peace. See VAGRANCY, 2.
Village marshal. See VAGRANCY, 2.

OPINIONS. See EVIDENCE, 1. RAILROADS (D.), 7.

PALACE CAR COMPANIES. See TAXATION, 1.

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PARENT AND CHILD.

See BASTARDY. DAMAGES, 7, 8. DIVORCE, 1, 2. ESTATES OF DECEDENTS, 1.

The parents of an infant child lived apart, and the mother supported it both before and after lands were devised to it. Upon the death of the child the parents became its sole heirs. *Held*, that in equity the mother was entitled to an allowance out of the child's estate for the amount expended by her upon its support. TAYLOR, J., dissents. *Pierce v. Pierce*, 73

PARTIES.

See ASSAULT AND BATTERY, 2. CONVERSION, 3. MUNICIPAL CORPORATIONS, 7, 8. TRUSTS AND TRUSTEES, 1.

1. A cause of action for the obstruction of a navigable river was assigned absolutely, in consideration of the assignee applying the net proceeds of the claim to the payment of certain debts of the assignors and paying any overplus to such assignors. *Held*, that the assignee might maintain the action in his own name. *Gates v. N. P. R. Co.* 64

2. Though where one person for a valuable consideration engages with another to do some act for the benefit of a third, such third person may maintain an action for a breach of the agreement, still he is not bound to invoke this rule of law in his favor. Thus, where one person for a valuable consideration agrees to assume a debt jointly with another, the creditor may still maintain an action against the original debtor alone. *Winninghoff v. Wittig*, 180

3. An action upon a recognizance taken in a criminal case should be brought in the name of the state. *State v. Wettstein*, 234

PARTITION of land of deceased person. See ESTATES OF DECEDENTS, 1.

PARTNERSHIP.

A partner may claim compensation for his services in connection with the partnership business if an agreement to that effect is fairly implied from the course of dealing between the partners or from circumstances of equivalent force. Upon the evidence in this case it is *held* (ORTON, J., dissenting) that there was such an implied agreement. *Emerson v. Durand*, 111

PAYMENT. See DAMAGES, 4. DURESS. PRACTICE, 7.

PERJURY. See PUBLIC LANDS.

PERSONAL PROPERTY. See ATTACHMENT, 5. BAILMENT. BILLS AND NOTES. CHATTEL MORTGAGES. CONTRACTS, 2, 5. CONVERSION. COURT AND JURY, DAMAGES, 6. ESTOPPEL, 1. EVIDENCE, 3. INSTRUCTIONS TO JURY. INSURANCE, 1–5. REPLEVIN. SALE OF CHATTELS. TOWNS, 1. TRUSTS AND TRUSTEES, 2–4.

PLACE OF TRIAL. See CHANGE OF VENUE.

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PLEADING.

See ACTION (E.). APPEAL (C.), 6. ATTACHMENT, 7. CONVERSION, 4, 5. COSTS. CRIMINAL LAW, 2, 3. DAMAGES, 6. DOGS. EJECTMENT. EQUITY. INSURANCE, 2, 4. LIMITATION OF ACTIONS, 1. MANDAMUS. MILWAUKEE MUNICIPAL COURT, 2. MORTGAGES, 3. PRACTICE, 1, 7. PUBLIC LANDS, 3. REPLEVIN, 2. SLANDER AND LIBEL, 1, 3. UNLAWFUL DETAINER, 1, 2.

1. The admission of a fact in an answer is available to the plaintiff, although the answer also contains a general denial. *Rhinehart v. Whitehead,* 42

2. An amendment of a complaint changing the action from one in equity to one at law, is inadmissible unless made by consent. *Fraedrich v. Flieth,* 184

3. If, after matter is stricken from a pleading, all evidence admissible under the original pleading can still be introduced, the error, if any, in striking out such matter will not work a reversal of the order. *Brachman v. Kuehnmuench,* 249

4. Motions to strike out matter from pleadings should be discouraged except where the retention of such matter would affect the substantial rights of the adverse party, or where the matter is scandalous. *Ibid.*

5. In an action for a breach of contract the complaint must contain an allegation that a contract, stating its substance, was made, or a clear statement of facts upon which a contract can be predicated. *Martin v. Atkinson,* 493

POSSESSION of land. See LIMITATION OF ACTIONS, 2, 3. VENDOR, ETC. OF LAND.

PRACTICE.

See ACTION. APPEAL. APPEALABLE ORDER. ATTACHMENT. ATTORNEY AT LAW. BANKS AND BANKING, 5. BASTARDY. CHANGE OF VENUE. CONVERSION, 3-5. CORPORATIONS, 3. COSTS. COURT AND JURY. CRIMINAL LAW. DIVORCE, 2. EQUITY. ESTATES OF DECEDENTS. EVIDENCE. INSTRUCTIONS TO JURY. JUDGMENT. JUSTICES' COURTS. MANDAMUS. MILWAUKEE MUNICIPAL COURT. MISTAKE. MORTGAGES. PARTIES. PLEADING. RAILROADS (B.), 1, 2. REFERENCE. REPLEVIN, 1. SERVICE BY PUBLICATION. SUPPLEMENTARY PROCEEDINGS. TRUSTS AND TRUSTEES, 1. UNLAWFUL DETAINER. VAGRANCY, 1. VERDICT.

1. The question whether the action is at law or in equity may be raised by an objection to a jury trial, especially if the complaint is not demurrable. *Fraedrich v. Flieth,* 184

2. If the defendant's objection to a jury trial on the ground that the action is equitable is overruled, he waives no right in that respect by going to trial before the jury. *Ibid.*

3. If, after such objection to a jury trial is overruled, and after such trial is had, the trial court is of the opinion that it erred in overruling the objection, it need not order a new trial but may take the verdict as advisory, provided the trial was conducted as it would have been had the cause been regarded throughout as in equity. *Ibid.*

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4. But where the trial was not so conducted, as where the jury viewed the premises in question and the judge did not, a new trial should be ordered. *Ibid.*

5. A view by a jury called in an equity case to determine a question of fact, should not be allowed unless the trial judge participates therein. *Ibid.*

6. The "grounds" shown by the affidavit upon which the time for taking any proceeding may, before its expiration, be enlarged (sec. 2831, R. S.), are *good* grounds, and the term is substantially equivalent to the "good cause shown" upon which the court may, after the expiration of the time, allow the proceeding to be taken. *Board of Sup'rs of Milwaukee Co. v. Pabst,* 244

7. Where the answer admits part of the plaintiff's claim to be just, an order may be entered requiring payment of that part. *Buffalo B. W. Co. v. Phillips,* 338

8. The appearance of a party without objection upon the hearing of a motion based upon certain papers, etc., is a waiver of notice that the motion would be based thereon. *Priest v. Varney.* 500

PREFERENCE of creditors. See VOLUNTARY ASSIGNMENT.

PRESCRIPTION. See LIMITATION OF ACTIONS, 2, 3.

PRESUMPTIONS. See ASSAULT AND BATTERY, 3, BANKS AND BANKING, 3. BILLS AND NOTES, 1. BOUNDARIES. BROTHERTOWN INDIANS, 6. CONVERSION, 6. CRIMINAL LAW, 5. RECORDING ACTS, 4. VENDOR, ETC. OF LAND, 4. WILLS, 1.

PRINCIPAL AND AGENT. See AGENCY.

PRINCIPAL AND SURETY. See ESTATES OF DECEDENTS, 2, 3.

PROMISSORY NOTES. See BILLS AND NOTES. CONTRACTS. CONVERSION, 1. CORPORATIONS, 2. CRIMINAL LAW, 3. DURESS, 3. EVIDENCE, 3. MORTGAGES, 2.

PROXIMATE CAUSE. See RAILROADS (D.), 3.

PUBLICATION. See SERVICE BY PUBLICATION.

PUBLIC LANDS.

See BROTHERTOWN INDIANS. TAXATION, 5–7.

1. A state court may have jurisdiction to inquire into the right of a party to a patent from the United States under the homestead act, and to reverse the decision of the land department adverse to such right, when procured by fraud or perjury; but such jurisdiction can be exercised effectually only when the title is vested in a party amenable to such jurisdiction, so that a judgment can be entered which will act effectually upon the title, and compel defendant to convey it to the party defrauded. *Empey v. Plugert,* 603

2. In exercising such a jurisdiction the court will not disturb the adjudication of the land department, except in clear cases of fraud, mistake, perjury, or violation of the law. *Ibid.*

3. Where perjury is alleged as a ground for setting aside the decision of the land department, the complaint should show that the decision was the consequence of the false testimony or perjury and was

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not supported by other evidence, and also that the plaintiff used every reasonable effort to obtain evidence to contradict such false testimony. It must also be shown that an effort was made to obtain a rehearing before the land department. *Ibid.*

QUIA TIMET. See EQUITY.

QUITCLAIM DEED. See RECORDING ACTS, 8.

RACINE CITY CHARTER. See MUNICIPAL CORPORATIONS, 2.

RAILROADS.

(A.) *Taxation.*
See TAXATION.

(B.) *Taking of land.*

1. A single notice that several persons whose lands have been taken for a railroad, appeal, each severally and for himself, from the award of damages made to each of them by the commissioners of appraisal, is sufficient. *Larson v. S. S. L. R. Co.* 59

2. The owner of several lots or parcels of land taken for a railroad, and for which damages have been awarded separately, may take a single appeal from the whole award; and a notice stating generally that he appeals from the award is sufficient. *Ibid.*

3. Estimates by witnesses of the damage done to land (most of which was under water) by the construction of a railroad across it, based upon the fact that such railroad would prevent the dredging of a canal along the whole length of the tract, by which the land could be filled up and rendered available for business purposes, are *held* improper to be considered in assessing the compensation to be made to the owner, where it further appears that such canal could not in any case be made unless it could be connected with an extension of an existing canal, and that the making of such extension is uncertain, depending upon the acts and will of other persons and upon many contingencies. *Munkwitz v. C., M. & St. P. R. Co.* 403

4. The fact that the jury also viewed the premises cannot of itself sustain an assessment based upon such estimates. *Ibid.*

5. Evidence as to the amount awarded by commissioners of appraisal is not admissible on the trial of an appeal from such award. [But where one of the commissioners who joined in the award is a witness on such trial, it may be proper to call his attention to the amount of the award for the purpose of affecting the weight of his testimony.] *Ibid.*

(C.) *Bridges across navigable waters.*
See NAVIGABLE RIVERS.

(D.) *Negligence.*

1. Though the whistle is not blown nor the bell rung on a locomotive before crossing a highway, as required by statute, the railroad company is not liable for an injury resulting from a collision at such crossing if the negligence of the person injured contributed thereto. *Williams v. C., M. & St. P. R. Co.* 1

2. The evidence in this case (stated in the opinion) is *held* to show conclusively that if the driver of the plaintiff's team had exercised or-

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dinary vigilance while approaching a railroad crossing he would have discovered the locomotive by which such team was struck, in time to have avoided the collision. *Ibid.*

3. Upon the evidence in this case it is *held* that the questions of the negligence of the defendant and the contributory negligence of the plaintiff's intestate, who was struck and killed by defendant's train at a highway crossing, were properly for the jury; and an order of the trial court setting aside a nonsuit previously granted, and directing a new trial, is affirmed. *Leavitt v. C. & N. W. R. Co.* 228

4. Upon the evidence in this case it is *held* that the question whether the engineer or fireman on defendant's locomotive could have seen plaintiff's intestate (a boy about seven years old, who was run over and killed by such locomotive at or near a street crossing) so as to have known of his danger before the accident, and the questions of contributory negligence on the part of the deceased or his father, were properly submitted to the jury. [Whether the question of defendant's negligence in not keeping a watchman or flagman at such crossing, should have been submitted to the jury, not determined.] *Johnson v. C. & N. W. R. Co.* 425

5. Plaintiff's intestate, who, in pursuance of a contract for the carriage of horses, and in accordance with the custom in such cases, was riding in the same car with the horses in order to care for them, was killed in a collision caused by defendant's gross negligence. *Held*, that he would not, as an ordinary passenger who had voluntarily placed himself in a dangerous position, be deemed to have been guilty of contributory negligence. *Lawson v. C., St. P., M. & O. R. Co.* 447

6. The jury should not be instructed that a person who voluntarily places himself in a dangerous position and thereby contributes to an injury cannot recover for such injury, unless such instruction is qualified so as to embrace the element of common prudence. *Ibid.*

7. The opinions of witnesses as to whether a stock car was a dangerous place for a person to ride, are not admissible. *Ibid.*

8. Where it is customary for some person to ride in the same car with horses, to care for them, it would seem to be within the general authority of the conductor of the train to grant permission to a person so to ride for that purpose. *Ibid.*

9. A carrier cannot by stipulations in a special contract wholly exempt itself from liability for an injury resulting from its gross negligence. *Ibid.*

10. Although the negligence of the defendant is admitted in the answer, it is not error to admit evidence of the circumstances of the injury complained of, in order to show that the negligence was *gross*. *Ibid.*

11. Where the uncontroverted evidence showed that a railroad station at which a collision occurred was only a signal station; that there was no depot or depot grounds, but only a side-track, and no person stationed there, it was not error in an instruction to the jury, after stating those facts, to add that "the only person who could give signals at that point would be men connected with trains stopping at that point." *Phillips v. C., M. & St. P. R. Co.* 475

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12. Between Milwaukee and Schwartzburg, the trains of the W. C. railroad were run over the defendant's track under the rules and running orders prescribed by the defendant. A W. C. freight train left Milwaukee under special orders from defendant's train-dispatcher to "run wild to Schwartzburg, keeping clear of regular trains." There was a dense fog, and at a signal station between those points said train ran into a train of the defendant which had left Milwaukee before it and was then more than an hour behind time, and which was backing, when the collision occurred. A brakeman of the W. C. train was killed. In an action to recover damages for such killing, *held:*

(1) An instruction to the jury that the persons in charge of the W. C. train were bound to observe the rules of the defendant so far as they did not conflict with the special orders which they had received, was not misleading to the prejudice of the defendant.

(2) A train which if on time would not have arrived at Schwartzburg until after the W. C. train had left the last telegraph station before that place, was a "regular" train, for which a lookout was to be kept.

(3) A rule that trains are always to "approach a station on the supposition that a train is to be met there and is standing upon the main track," contemplates only the *meeting* of trains.

(4) The questions of negligence in the management of the W. C. train, and of negligence on the part of those in charge of the defendant's train in failing to give any signals or warning to trains which might be following, were properly submitted to the jury. *Ibid.*

13. A rule required that "conductors and brakemen of freight trains approaching stations must be out on their trains at least one mile from every station." As the W. C. train approached the station at which the collision occurred the conductor was riding upon the engine and the brakeman who was killed was standing in the gangway between the tank and the engine. It was so foggy that the engineer could not see more than fifteen feet ahead of the engine. *Held:*

(1) The negligence, if any, of the conductor and brakeman in remaining in those places, was remote and did not contribute to the accident.

(2) Although had the brakeman been at his post on top of the cars he might not have been injured, yet his improper position was not the proximate cause of the injury. *Ibid.*

14. Neither the W. C. company nor the defendant had any control over the employees of the other, except that upon the track in question the W. C. train-men were required to obey the rules prescribed by the defendant's general manager and the special orders given by the defendant's train-dispatcher. *Held,* that plaintiff's intestate was not a fellow-servant of the men in charge of the defendant's train whose negligence caused the accident. *Ibid.*

15. A person not a passenger got upon a railroad train at a station for the purpose of assisting his wife, who was a passenger, therefrom. His wife had already left the train. The train suddenly started while he was upon the platform of a car, and he was thrown therefrom and injured. Before the train started all passengers for that station had gotten off, and those waiting to take the train had gotten on, and the mail, express matter, and baggage had been put off. How long the train stopped, and whether any signal of start-

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ing was given, were matters in dispute. None of the employees of the railroad company knew that he expected to go upon the train or that he had done so; and a brakeman knew that his wife had gotten off the train and needed no assistance. *Held*, that the company was not liable for the injury. *Griswold v. C. & N. W. R. Co.* 652

RAPE. See CRIMINAL LAW, 4.

RATIFICATION. See CORPORATIONS, 1.

REAL PROPERTY. See ATTACHMENT, 8. BOUNDARIES. BROTHERTOWN INDIANS. CORPORATIONS, 6. DAMAGES, 2-4. DEED. DIVORCE, 3, 4. DOWER. EJECTMENT. EQUITY. ESTOPPEL, 2. EVIDENCE, 3. GARNISHMENT. HIGHWAYS, 3, 4. INSURANCE, 6. JUSTICES' COURTS. LANDLORD AND TENANT. LIMITATION OF ACTIONS, 2, 3. MINES AND MINING. MORTGAGES. MUNICIPAL CORPORATIONS, 3-8. PUBLIC LANDS. RAILROADS (B.). RECORDING ACTS. TAXATION, 5-8. UNLAWFUL DETAINER. VENDOR, ETC. OF LAND. WILLS, 1, 2.

RECEIPT. See LIMITATION OF ACTIONS, 3.

RECEIVER. See CORPORATIONS, 3.

RECOGNIZANCE. See COSTS. MILWAUKEE MUNICIPAL COURT. PARTIES, 3.

RECORDING ACTS.

1. A recorded deed and a judgment correcting it and expanding the description, constitute together a completed conveyance of the same nature as the deed itself. *Cutler v. James*, 173

2. The record of such judgment in the office of the register of deeds will relate back to the time of filing the notice of *lis pendens*, and all purchasers whose conveyances were not then recorded will be bound thereby although they were not parties to the action. *Ibid.*

3. A quitclaim deed is a "conveyance" within the meaning of sec. 2241, R. S., and when recorded the grantee therein, if "a purchaser in good faith and for a valuable consideration," will be protected as such against a prior unrecorded warranty deed. *Ibid.*

4. Under the circumstances of this case the burden of proving that a defendant, who purchased land from the person in possession and claiming to be the owner thereof, had notice of a prior unrecorded deed from his grantor to the plaintiff, is *held* to be upon the latter. *Ibid.*

REFERENCE.

Recitals, in an order directing the reference of a cause, that it appears from the pleadings and the admissions of counsel that the plaintiff's bill of items contains seventy items and the defendant's bill of particulars contains thirty items, that the trial will require the examination of a long account, etc., are held sufficient to authorize the reference, notwithstanding an objection thereto. *Priest v. Varney*, 500

REFORMATION of deed. See RECORDING ACTS, 1, 2.

REGISTRY OF DEEDS. See RECORDING ACTS.

RELEASE. See TRUSTS AND TRUSTEES, 1.

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REPLEVIN.

See ESTOPPEL, 1.

1. Where there was no uncertainty as to the property to be taken, and the right property was taken, on a writ of replevin, a variance between the description in the affidavit and that in the writ may be cured, if necessary, by amendment. *McCourt v. Bond*, 596

2. A defendant in replevin who does not show that in taking the property from the plaintiff he represented a creditor of the plaintiff's assignor and acted by virtue of legal process, stands in the position of a mere trespasser and cannot question the validity of the assignment under which the plaintiff was in possession. *Ibid.*

RES ADJUDICATA. See MINES AND MINING, 5. TRUSTS AND TRUSTEES, 8.

RESCISSION. See SALE OF CHATTELS, 1, 2.

RESTITUTION. See APPEAL (C.), 1, 5. JUSTICES' COURTS.

SALE OF CHATTELS.

See DAMAGES, 6. TELEGRAPH COMPANIES.

1. In the absence of fraud or a mistake as to the identity of the thing sold, the vendor cannot rescind the sale and maintain an action of replevin. *Wood v. Boynton*, 265

2. Where the value of the thing sold was open to the investigation of both parties, and both supposed at the time that the price paid was a fair one, no disparity, however great, between such price and the real value, is to be received in an action at law as evidence of fraud. *Ibid.*

3. G. agreed to sell and deliver to B. 1,000 cords of wood "to be delivered from G.'s pier [in Michigan] over the rail of the vessel . . . and to be delivered from time to time to B.'s vessel as wanted during the season of navigation; said wood to be piled as taken from vessel, and to be measured and paid for when piled on B.'s dock in Milwaukee." A cargo of the wood was lost after delivery over the rail of B.'s vessel at G.'s pier. In an action by G. to recover therefor at the contract price, *held:*

(1) Though the contract was executory when made, yet as each cargo was delivered on board B.'s vessel, the contract as to such cargo became an executed sale, and the title to such cargo vested at once in B. although it was not to be paid for until piled and measured on his dock.

(2) The piling and measurement having been rendered impossible, if not through B.'s fault, by the act of God, B. must pay for the cargo lost. *Gill v. Benjamin*, 362

4. A finding of the trial court that plaintiff contracted to deliver only one car-load of oil to the defendant, is *held* to be sustained by the evidence. *Scofield v. Claggett*, 437

5. An oral contract for the sale and delivery of a quantity of logs valued at $100, no part of which has been delivered and no part of the purchase price for which was paid at the time of making the contract, is void under the statute of frauds. *Hanson v. Roter*, 623

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6. The evidence in this case is *held* not to show that the agreement was that when the logs were deposited at the place designated the title should pass to the defendant without any further act on his part, or that any part of the purchase price was paid when the contract was made. *Morrow v. Reed*, 30 Wis. 81, distinguished. *Ibid.*

SALE OF LANDS. See DAMAGES, 2–4. DEED. DOWER. ESTOPPEL, 2. EVIDENCE, 3. GARNISHMENT. LIMITATION OF ACTIONS, 2, 3. RECORDING ACTS. TAX TITLES. VENDOR, ETC. OF LAND.

SCIENTER. See DOGS.

SERVICE of notice of injury on highway, etc. See HIGHWAYS, 5.

SERVICE BY PUBLICATION.

1. To authorize an order for service by publication under subd. 1, sec. 2639, R. S., the affidavit must show that the nonresident defendant has property within the state, or that the cause of action arose within the state. *Manning v. Heady*, 630

2. The complaint must be filed before an order for service by publication is made. *Ibid.*

3. Where the record shows that an order for service by publication was made upon insufficient or defective proof, sec. 2641, R. S., is inapplicable, and the order itself is not proof of the existence of the requisite facts. *Ibid.*

4. Personal service of the summons and complaint outside of the state will not give jurisdiction if no valid order for service was made. *Ibid.*

SETOFF. See BILLS AND NOTES, 4.

SETTLEMENT. See ATTORNEY AT LAW, 3.

SHIPPING, ETC. See CONVERSION, 2.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 1, 5–8

SLANDER AND LIBEL.

1. A complaint in an action for slander alleged that the plaintiff was a butcher and keeper of a meat market, and that the defendant spoke of and concerning him and his business, the words "That S. (the plaintiff meaning) had taken an unborn calf from a dead cow, dressed it, and sold a quarter of it to Mrs. Z. (meaning that this plaintiff had taken an unborn calf from a dead cow, dressed it for his meat market, and sold a quarter of it to Mrs. Z. as food for herself and family to eat)." *Held*, that the innuendo does not enlarge the meaning of the words spoken. *Singer v. Bender*, 169

2. Words which tend directly to the prejudice of a person in his trade or business are actionable although they do not impute a crime. *Ibid.*

3. A complaint for slander alleged that the defendant spoke certain words in the German language which when translated into English were understood to mean, and do mean, that, etc., and that the words were so understood by the persons to whom they were spoken. *Held*, that this was a sufficient averment of their correct translation. *Ibid.*

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4. To state in writing of a man that he "has turned into an enormous swine, which lives on lame horses," and that he "will probably remain a swine the rest of his days," is libelous *per se*. *Solverson v. Peterson*, 198

SLEEPING CAR COMPANIES. See TAXATION, 1.

SPECIAL VERDICT. See JUDGMENT (B.); (I.), 2.

SPECULATIVE DAMAGES. See DAMAGES, 1.

SPUR TRACKS. See TAXATION, 4 (4).

STATUTE OF FRAUDS. See CHATTEL MORTGAGES, 4, 5. CONTRACTS, 5. SALE OF CHATTELS, 5, 6.

STATUTE OF LIMITATIONS. See ESTATES OF DECEDENTS, 2. LIMITATION OF ACTIONS.

STATUTES.

Enactment. See CHANGE OF VENUE, 1.

Sec. 4135, R. S., providing that the printed copies of the statutes shall be *sufficient* evidence thereof, does not make them *conclusive* evidence that a statute therein contained was enacted by the legislature. That such statute was not so enacted may be shown by the legislative journals. *Meracle v. Down*, 323

Constitutionality. See TAXATION, 1. TAX TITLES, 1. UNLAWFUL DETAINER, 5. VAGRANCY, 3.

Construction. See ACTION (D.), 2. APPEAL (A.), 3, 5; (C.), 1–5. ATTACHMENT, 4. BANKS AND BANKING, 1, 4. BROTHERTOWN INDIANS, 2, 7. CHANGE OF VENUE, 2. CHATTEL MORTGAGES, 5. CONVERSION, 3. COURTS. DIVORCE, 1. EQUITY. ESTATES OF DECEDENTS, 2. HIGHWAYS AND BRIDGES, 1, 2, 7. LIMITATION OF ACTIONS, 3. MILWAUKEE MUNICIPAL COURT, 1. MINES AND MINING, 4. MUNICIPAL CORPORATIONS, 2, 3, 7, 8. PRACTICE, 6. RECORDING ACTS, 3. REFERENCE. SERVICE BY PUBLICATION, 1, 3. TAXATION, 1–4. TOWNS, 2. UNLAWFUL DETAINER. VAGRANCY, 1. VOLUNTARY ASSIGNMENT. WILLS, 1.

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SUMMONS, Service of. See SERVICE BY PUBLICATION.

SUPPLEMENTARY PROCEEDINGS.

The order and scope of the examination of a judgment debtor in a proceeding supplementary to execution are largely in the discretion of the judge or commissioner before whom such examination is being taken; and this court will not interfere and limit such examination unless it clearly appears that there has been an abuse of discretion in requiring the debtor to answer improper interrogatories. *Heilbronner v. Levy*, 636

SUPREME COURT. See APPEAL (A.).

SURETYSHIP. See ESTATES OF DECEDENTS, 2, 3.

TAXATION.

1. Ch. 353, Laws of 1883, providing that owners of palace, drawing-room, and sleeping cars shall annually return to the railroad commissioner a "statement of the gross earnings made by the use of such cars *between points within the state* of Wisconsin," and shall pay a license fee of two per cent. of such earnings, requires a statement only of the earnings derived from the use of such cars in transporting passengers who both get on and off at points within the state. [Whether if construed otherwise the act would be constitutional, not determined.] *State v. Pullman's P. C. Co.* 89

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2. Statutes imposing license fees which are, to all intents and purposes, taxes, should be governed by the sames rules of construction as those imposing taxes *eo nomine*. *State ex rel. Abbot v. McFetridge.* 130

3. Such statutes should be construed with reasonable strictness against the government; and where the terms used are susceptible of two meanings, that should be preferred which imposes the lighter burden. CASSODAY, J., dissents. *Ibid.*

4. Sec. 1211, R. S., provides that railroad companies and persons operating railroads in this state shall annually make and return a "statement of the gross earnings of their respective roads for the preceding calendar year, of the number of miles operated by each such company or person, and the gross earnings per mile per annum during such year." Sec. 1212 provides that the company or person "so operating any railroad shall, on returning such statement, apply for a license to operate" such railroad, and shall pay the license fee provided in sec. 1213. Sec. 1213 divides railroads into classes according to the gross earnings "per mile per annum of operated road," and fixes the license fee for each class. *Held:*

(1) In determining the class to which any railroad belongs, the number of miles operated and the gross earnings during the preceding calendar year only are to be considered, regardless of the length of time that the road was operated during that year. CASSODAY, J., dissents.

(2) The statement required is only of the earnings of railroads which the applicant is operating when the return is made, and for the privilege of operating which he is required to obtain license.

(3) When one company commences operating a road early in any given year, and the same was operated by another company during the preceding year, the earnings of the latter company thereon form the proper basis for computing the license fee to be paid by the company first mentioned.

(4) Spur tracks are to be included in the mileage of a railroad.

(5) The rental paid for a leased railroad is not to be deducted from the gross earnings upon which the license fee to be paid by the lessee is computed.

(6) The amount received by a company for the use of its cars, in excess of the amount paid out by it for the use of the cars of other companies, is a part of the gross earnings upon which the license fee is to be computed. *Ibid.*

5. Although the granting act required the completion of the road December 31, 1876, and the same was not completed until June, 1877, yet such delay worked no forfeiture of the grant, as there was no action by Congress or in any court, before such completion nor since, declaring such forfeiture. *Wis. Cent. R. Co. v. Price Co.* 579

6. By the location and completion of the road according to all the requirements of the granting act, the plaintiff secured an equitable right to all the lands granted to it; and, upon such completion, such equitable right at once attached to such of the granted lands as were situated within the place limits, including the eleven forties in question, and hence they were properly taxable in 1883. *Ibid.*

7. Those portions of the lands in question which were situated within the indemnity limits, having, prior to the assessment complained of, been duly selected by the proper party, and such selections duly certified to by the proper local United States land agents, and also

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by the governor of the state; and a list of the lands so selected and so certified having been presented to the secretary of the interior, and patents therefor requested; and all fees and charges thereon having been paid, or in effect tendered; and the secretary of the interior having refused to grant such patents on the sole ground that, upon his construction of a prior decision of the supreme court of the United States, the plaintiff had already received patents in excess of the lands granted, but which construction has recently been held by the same court to be unfounded; and there being no claim or pretense that such refusal was made on the ground that any of the lands in question were swamp lands, or lands to which the right of preemption or homestead had attached; or that any of them had been reserved for any other purpose, or sold or disposed of to any other corporation or person; or that any other party was making any claim to any of them; or that the secretary found any fault or made any objection to any of the selections so made and certified; or that there was any other ground for such refusal than the one stated,—it is *held* that such action and non-action of the secretary of the interior in the premises were equivalent to a recognition and acquiescence in the selections so made, certified, and presented to him, and, in effect, an approval and acceptance of the same by implication; and therefore, that the plaintiff's equitable right to the lands so selected, certified, presented, approved, and accepted, thereby specifically attached, and became certain in description, and hence that such lands were properly taxable in 1883. *Ibid.*

8. The mere fact that the taxes in question were not assessed to the plaintiff by name, nor to "unknown," is not a valid reason for sustaining the judgment. *Ibid.*

TAX TITLES.

1. Ch. 53, Laws of 1866 (R. S. sec. 1047; ch. 268, Laws of 1881), providing that in tax deeds *theretofore*, as well as those thereafter, issued, "any description of lands which shall indicate the land intended with ordinary and reasonable certainty, and which would be sufficient between grantor and grantee in an ordinary conveyance, shall be sufficient,"—is valid. *Meade v. Gilfoyle,* 18

2. Under that act extrinsic evidence is admissible in aid of the description in tax deeds whenever it would be admissible in the case of ordinary conveyances. *Ibid.*

TELEGRAPH COMPANIES.

1. A stipulation upon a telegraph blank that the company will not be liable for mistakes or delays in the transmission or delivery of any *unrepeated* message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, is void so far as it attempts to limit the liability for a want of ordinary care and diligence. *Thompson v. W. U. Tel. Co.* 531

2. The following telegram was delayed in transmission by negligence of the defendant's servants: "Send bay horse to-day. Mock loads to-night." Mock was a well known buyer who was in the habit of shipping horses from the vicinity of the place from which the message was sent, and presumably the defendant's agent there

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knew that fact. The delay caused the sender of the message to lose the sale of the horse. *Held*, that the company was liable for actual damages. *Ibid.*

TENANCY in common. See MINES AND MINING, 3.

TENDER.

See DAMAGES, 3.

A finding that a tender was made to the plaintiff is *held* to be sustained by evidence showing a tender to her husband, who was her agent, although the defendant made the tender to him supposing him to be the real party in interest. *Conrad v. Trustees*, 258

TORTS. See ASSAULT AND BATTERY. CONVERSION. DAMAGES, 1, 5, 7-9. DECEIT. DOGS. ESTATES OF DECEDENTS, 4. ESTOPPEL, 1. EVIDENCE, 1, 2. FALSE IMPRISONMENT. HIGHWAYS AND BRIDGES, 5-9. MINES AND MINING, 5. MUNICIPAL CORPORATIONS, 1, 5-8. NAVIGABLE RIVERS. NEGLIGENCE. RAILROADS (D.). REPLEVIN. SLANDER AND LIBEL. TOWNS, 2. UNLAWFUL DETAINER.

TOWNS.

See HIGHWAYS, 7, 8.

1. A verdict to the effect that certain railroad stock had been apportioned and divided between the parties, or that the city had received an equivalent of its share thereof, is *held* not to be supported by any evidence. *City of Seymour v. Town of Seymour*, 16

2. Subd. 2, sec. 821, R. S., as amended by ch. 113, Laws of 1882, refers only to accounts, and not to claims for damages arising *ex delicto*. *Spearbracker v. Larrabee*, 573

TRAMP LAW. See VAGRANCY.

TRANSACTIONS with deceased persons. See EVIDENCE, 3.

TRANSLATION of libelous publication. See SLANDER AND LIBEL, 3.

TRANSMISSION of record. See CHANGE OF VENUE, 3, 4.

TRESPASS. See CONVERSION, 6. REPLEVIN, 2.

TRIAL. See ACTION (D.), (E.). CHANGE OF VENUE. PRACTICE. SUPPLEMENTARY PROCEEDINGS. VAGRANCY, 1.

TRUSTS AND TRUSTEES.

See BROTHERTOWN INDIANS, 7. CORPORATIONS, 4, 5. MUNICIPAL CORPORATIONS, 3, 4.

1. If the county court can lawfully terminate a testamentary trust for the support and maintenance of a person during life, while such beneficiary is still living (a question not determined), such a trust should not be so terminated without a full hearing in some proceeding to which all persons interested in the trust fund are parties, nor without security being given that the beneficiary shall never want for maintenance, if the trust fund would have been sufficient therefor. If a release executed by the beneficiary is the basis of the application for the termination of the trust, the court

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should investigate the circumstances under which the release was executed, the capacity of the beneficiary, and whether the execution of the release was a judicious and discreet act. Whether any of the foregoing requirements might be dispensed with if the trustee consented to the termination of the trust, not determined. *Sumner v. Newton,* 210

2. Where a trustee is required to invest the trust fund in U. S. bonds or on real estate security, the interest which he might have obtained on real estate security of the proper character is the measure of his liability for a failure to invest the fund. *Andrew v. Schmitt,* 664

3. A former judgment in an action upon a trustee's bond for a breach of the condition "that he shall pay all moneys which it shall become his duty to pay as such trustee," by a refusal to pay over certain interest to the *cestui que trust,* is not a bar to another action upon the bond for a breach of the condition to keep the trust fund properly and constantly invested. *Ibid.*

[4. Whether a trust for the investment of money "in U. S. bonds or in other safe manner with ample real estate security," does not require that any investment other than in U. S. bonds shall be absolutely safe and the security absolutely ample, and make the trustee an insurer of the fund, both principal and interest, or at least that such other investment shall be as safe as one in U. S. bonds, not determined.] *Ibid.*

UNDUE INFLUENCE. See ATTORNEY AT LAW, 3.

UNLAWFUL DETAINER.

See JUSTICES' COURTS.

1. Under the statutes "of forcible entry and unlawful detainer" (ch. 145, R. S.) the question of title does not arise and cannot be put in issue by the pleadings. *Newton v. Leary,* 190

2. But the facts upon which the right of removal under subd. 1, sec. 3359, R. S., is based, may be put in issue by the answer, and the issues so raised may be tried and determined in a justice's court. *Ibid.*

3. Under subd. 1, sec. 3358, R. S., a tenant holding possession after the expiration of the term by lapse of time, without the permission of the landlord, may be removed without giving him notice to quit. *Toal v. Clapp,* 223

4. The execution for costs, "as in other actions of tort," authorized by sec. 3366, R. S., may be issued in all cases of unlawful detainer under the statute, whether there was a forcible entry or not. *Ibid.*

5. An action for unlawful detainer is an action of tort, and the imprisonment of the defendant under an execution issued therein for the costs is not imprisonment "for debt arising out of or founded on a contract," within the meaning of sec. 16, art. I, Const. of Wis. *Ibid.*

USAGE. See CHANGE OF VENUE, 3. BANKS AND BANKING, 3.

USER. See HIGHWAYS, 2, 3.

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VAGRANCY.

1. If upon the trial of a person before a justice of the peace for vagrancy under sec. 1543, R. S., the evidence shows that the accused is probably guilty of being a "tramp" within the meaning of ch. 342, Laws of 1883, it is in the discretion of the justice whether he will proceed with the trial or bind the accused over to answer to the court having jurisdiction of the greater offense. *Johnson v. Waukesha Co.* 281

2. The evidence in this case is *held* insufficient to show a conspiracy between a village marshal and justices of the peace to enhance their fees by ignoring ch. 342, Laws of 1883, and proceeding against all "tramps" under the general vagrancy law. Whether such a conspiracy would constitute a defense to an action by the marshal against the county for his services in such cases, is not determined. *Ibid.*

3. The constitutionality of ch. 342, Laws of 1883, known as the "Tramp Law," considered but not determined. *Ibid.*

VARIANCE. See CRIMINAL LAW, 1. REPLEVIN, 1.

VAULTS under sidewalks. See MUNICIPAL CORPORATIONS, 5, 6.

VENDOR AND PURCHASER OF LAND.

See DAMAGES, 2–4. DEED. DOWER. ESTOPPEL, 2. EVIDENCE, 3. GARNISHMENT. LIMITATION OF ACTIONS, 2, 3. RECORDING ACTS. TAX TITLES.

1. Actual possession by the vendee in a land contract is notice to all the world of his rights. *Meade v. Gilfoyle,* 18

2. Where the language in the description of the land conveyed or excepted from the conveyance is otherwise doubtful, a practical location by the agreement, acts, conduct, or declarations of the parties concerned, followed by adverse and exclusive possession, is sufficient to remove the doubt and give certainty to the description. *Ibid.*

3. The wife of a grantee of land, to whom, after his eviction, the lands have been transferred by voluntary conveyances, has no other or greater rights in an action against the grantor for the breach of the covenant of seizin, than such grantee himself would have had. *Conrad v. Trustees,* 258

4. The presumption is that the grantee in a warranty deed went into possession of the land granted and has not been disturbed therein, and he must show the contrary in order to recover the consideration paid, or to defeat an action upon a promissory note given as a part of such consideration. *Bardeen v. Markstrum,* 613

5. Land was sold and conveyed absolutely, but by the terms of the deed and of a bond given for the payment of the purchase price, the possession was reserved to the grantor for one year. *Held,* that at the end of the year, in the absence of any provision to the contrary, the right of possession vested in the grantee, although a part of the purchase price remained unpaid. *Evans v. Enloe,* 671

VENUE. See CHANGE OF VENUE.

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VERDICT.

See JUDGMENT (B.); (I.), 2. PRACTICE, 3.

A verdict which in the result of mere conjecture, and is not founded upon evidence, cannot be sustained. *Hickey v. C., M. & St. P. R. Co.* 649

VESSELS. See CONVERSION, 2. NAVIGABLE RIVERS.

VIEW. See PRACTICE, 4, 5. RAILROADS (B.), 4.

VILLAGES. See HIGHWAYS, 7, 8.

VOLUNTARY ASSIGNMENT.

B. & B. operated a steam wood factory in which men were employed by them, and took contracts for all kinds of light wood work. L. & L. had a contract with them by which lumber furnished by L. & L. was sawed into strips and beaded by B. & B., and L. & L. were to pay them $15 per thousand feet for working up the lumber, and to make payments at the rate of $50 per month. In a voluntary assignment by L. & L., B. & B. were preferred as creditors for the amount due on such contract. *Held*, that B. & B. were not "laborers, servants, or employees" of L. & L., and the amount due them was not "wages," within the meaning of sec. 1, ch. 349, Laws of 1883, and the assignment was therefore void. *Lang v. Simmons*, 525

VOLUNTARY PAYMENT. See DAMAGES, 4. DURESS, 2.

WAIVER.
Of insufficiency of complaint in justice's court. See APPEAL (C.), 6.
Of insufficiency of affidavit. See ATTACHMENT, 7.
Of defense against note on ground of fraud. See BILLS AND NOTES, 2.
Of notice of protest of note. See CONTRACTS, 5.
Of proofs of loss, or of defects therein. See INSURANCE, 2, 3, 5.
Of right to trial by court in equity case. See PRACTICE, 1, 2.
Of notice of papers on which motion is based. See PRACTICE, 8.

WILLS.

See TRUSTS AND TRUSTEES, 1.

1. Sec. 2278, R. S., does not exclude, in a proper case, the consideration of surrounding circumstances in determining the intent of a testator in a devise of land. It merely changes the common-law presumption that unless words of inheritance or other words indicating a greater estate are used, a life estate only is intended to be devised. *Dew v. Kuehn*, 298

2. A will provided as follows:
"I hereby give and bequeath unto my beloved husband Charles F. Kuehn all my real estate situated in the town of Concord. Jefferson county and state of Wisconsin. on section eleven it being all my freehold estate whatsoever. which is situate in the town of Concord. Jefferson county and state of Wisconsin. I also give and bequeath unto my said husband. Charles F. Kuehn. all the rest residue and remainder of my personal estate chattels of whatsoever kind and nature whatsoever. to hold and keep for his natural life.

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"I further direct that immediately after it shall be divided share and share alike between," etc.

At the time of executing the will and also at her death the personal property of the testatrix was insufficient to pay her debts. *Held*, that the limiting words "to hold and keep for his natural life" attach to the gift of the realty as well as to that of the personal property, and the husband takes but a life estate in such realty. *Ibid.*

3. A will drawn in accordance with the instructions of a person of sound mind, and executed by him in due form of law, with full and accurate knowledge of its contents, is valid, although it is written in the English language and the testator did not understand that language. *Will of Walter*, 487

WISCONSIN CENTRAL RAILROAD LAND GRANT. See TAXATION, 5-8.

WITNESS — Adding name to note. See CONTRACTS, 2.

WORDS AND PHRASES.
"*Account*," in statute. See TOWNS, 2.
"*As near as may be*," in statute. See ATTACHMENT, 3.
"*Assign or underlet*," in lease. See LANDLORD AND TENANT.
"*Between points within the state*," in statute. See TAXATION, 1.
"*Bona fide purchaser*." See CHATTEL MORTGAGES, 5.
"*Contained in*," in policy. See INSURANCE, 1.
"*Conveyance*," in statute. See LIMITATION OF ACTIONS, 3. RECORDING ACTS, 1, 3.
"*Cruel and unusual punishments*," in constitution. See VAGRANCY, 3.
"*Debt* arising out of or founded on a *contract*," in constitution. See UNLAWFUL DETAINER, 5.
"*Grounds*" shown, in statute. See PRACTICE, 6.
"*Laborers, servants, or employees*," in statute. See VOLUNTARY ASSIGNMENT.
"*Long account*," in statute. See REFERENCE.
"*May*," equivalent to *shall*, in statute. *Meiners v. Loeb*, 347.
"*Occupied*," in policy. See INSURANCE, 6.
"Per mile *per annum* during such year," in statute. See TAXATION, 4 (1).
"*Proceedings* in the action," in statute. *Meiners v. Loeb*, 346.
"*Regular* trains." See RAILROADS (D.), 12 (2).
"Judgment is *reversed*," in statute. See APPEAL (C.), 1, 5.
"*Servants*," in statute. See VOLUNTARY ASSIGNMENT.
"*Setting up claim*" to land, in statute. See EQUITY.
"*Special order*," in statute. See APPEAL (C.), 3.
"*Sufficient* evidence," in statute. See STATUTES.
"*Town, connty and state roads*," in statute. *Spearbracker v. Larrabee*, 577.
"*Wages*," in statute. See VOLUNTARY ASSIGNMENT.
"*Written instrument as being a conveyance*," in statute. See LIMITATION OF ACTIONS, 3.

WRIT.
Of *mandamus*. See MANDAMUS.
Of restitution. See JUSTICES' COURTS.

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